90-1778

Supreme Court, U.S.
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CASE NO. _____

IN THE
Supreme Court of the United States

October Term, 1990

HARRY K. SINGLETARY
Secretary, Department of Corrections
Petitioner,

v.

STEPHEN TODD BOOKER,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-3751

STEPHEN TODD BOOKER,

Petitioner-Appellee,

versus

RICHARD L. DUGGER, Secretary, Florida Department of Corrections,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Florida

ORDER:

( ) The motion of _____ for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of _____ for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 15, 1991, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

Thomas A. Clark
UNITED STATES CIRCUIT JUDGE

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-3751

STEPHEN TODD BOOKER,

Petitioner-Appellee,

Versus

RICHARD L. DUGGER, Secretary, Florida Department of Corrections,

Respondent-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion January 14, 1991, 11th Cir., 1991, ____ F.2d ____).

Before: TJOFLAT, Chief Judge, JOHNSON and CLARK, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas A. Clark
UNITED STATES CIRCUIT JUDGE

Stephen Todd BOOKER,
Petitioner-Appellee,

v.

Richard L. DUGGER, Secretary, Florida Department of Corrections,
Respondent-Appellant.

No. 88-3751

United States Court of Appeals, Eleventh Circuit.

Jan. 14, 1991.

Defendant was convicted in the Circuit Court, Alachua County, John J. Crews, J., of first-degree murder, sexual battery and burglary, and sentenced to death, and he appealed. The Florida Supreme Court, Adkins, J., 397 So.2d 910, affirmed, and defendant petitioned for federal habeas relief. The United States District Court for the Northern District of Florida, No. 88-40228-MMP, Maurice Mitchell Paul, J., granted writ, and state appealed. The Court of Appeals, Clark, Circuit Judge, held that *Hitchcock* error, arising from trial judge's instructing precluding jurors from considering nonstatutory mitigating circumstances in sentencing deliberations, was not harmless given existence of nonstatutory mitigating evidence, such as evidence of defendant's organic brain disorder.

Affirmed.

Tjoflat, Chief Judge, specially concurred and filed opinion.

Gary L. Printy, Asst. Atty. Gen., Dept. of Legal Affairs, Tallahassee, Fla., for respondent-appellant.

Michael A. Mello, Vermont Law School, South Royalton, Vt., Jeffery D. Robinson, Nussbaum, Owen & Webster, Washington, D.C., for petitioner-appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT, Chief Judge, and JOHNSON and CLARK, Circuit Judges.

CLARK, Circuit Judge:

The state of Florida appeals the district court's grant of habeas corpus. Because the district court correctly determined that petitioner Stephen Todd Booker's death sentence was imposed in violation of *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821 (1987) (applying *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954 (1978), to Florida capital punishment process), and because this error was not harmless, we affirm.

The facts of the underlying crime are set out in the opinion of the Florida Supreme Court on direct appeal. *Booker v. State,* 397 So.2d 910 (Fla.), *cert. denied,* 454 U.S. 957, 102 S.Ct. 493 (1981).

Booker's claim for relief is that the court that sentenced him to death was precluded from considering nonstatutory mitigating evidence he presented. *Hitchcock,* 481 U.S. at 393, 107 S.Ct. at 1821. Although Booker has been through one round of habeas corpus consideration in the federal courts, *See Booker v. Wainwright,* 703 F.2d 1251 (11th Cir.), *cert. denied,* 464 U.S. 922, 104 S.Ct. 290 (1983), his claim is not procedurally barred because *Hitchcock* represents a significant change in the law since his previous petition. Messer v. Florida, 834 F.2d 890, 892-93 (11th Cir. 1987).

He has exhausted his state court remedies. *Booker v. Dugger,* 520 So.2d 246 (Fla.), *cert. denied,* 486 U.S. 1061, 108 S.Ct. 2834 (1988).

Both the Florida Supreme Court and the district court found that there had been *Hitchcock* error at Booker's trial. The jury instruction given by the trial judge was the equivalent of that given in *Hitchcock,* and the prosecutor told the jury that they were only to consider the listed statutory mitigating circumstances. *Booker v. Dugger,* 520 So.2d at 247; District Court Order, Sept. 19, 1988, at 2. In a presentence memorandum, Booker's counsel brought the then-recent decision in *Lockett,* 438 U.S. at 586, 98 S.Ct. at 2954, to the trial court's attention. *See* "Memorandum in Support of Motion to Exclude the Death Penalty," Record on Appeal to Florida Supreme Court, pp. 135-37. However, *Lockett* did not figure in counsels' arguments to the court at the presentence hearing nor in the court's sentencing decision. Although the trial court, in passing sentence, noted that it "carefully considered" all the evidence in aggravation and mitigation introduced at trial, it then only discussed mitigating evidence as it applied to the statutory factors. *See* "Judgment and Sentence," Oct. 20, 1978, Record on Appeal, Tab C, p. 29.

The Florida Supreme Court held that the *Hitchcock* error was harmless, noting that "[t]here was simply no nonstatutory mitigating evidence sufficient to offset the aggravating circumstances upon which the jury could have reasonably predicated [a recommendation of life]." *Booker v. Dugger,* 520 So.2d at 249. That court also postulated that the sentencing judge would have overridden any jury recommendation of a sentence less than death. *Id.* The district court found that neither the sentencing jury nor the judge considered Booker's nonstatutory mitigating evidence outside of the statutory scheme. Because it was loath to speculate as

to the possible effects of this excluded evidence on the sentencing body, the district court granted the writ. Order, p. 3.

Our analysis is focused solely on Florida's contention that the Hitchcock error was harmless beyond a reasonable doubt. *See generally Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). This court's precedents have largely limited the applicability of harmless error analysis in *Hitchcock* claims to instances where the petitioner or counsel made a strategic decision not to present mitigating evidence, or where no nonstatutory mitigating evidence could have been produced. *See, e.g., Delap v. Dugger,* 890 F.2d 285, 304-06 (11th Cir. 1989) (error not harmless where evidence of remorse, capacity for rehabilitation, good behavior, and organic brain damage not considered), *cert. denied,* 110 S.Ct. 2628 (1990); *Demps v. Dugger, 874 F.2d 1385, 1389-91 (11th Cir. 1989) (error harmless* where record revealed the non-availability of supportable mitigating evidence), *cert. denied,* 110 S.Ct. 1834 (1990); *Tafero v. Dugger,* 873 F.2d 249, 252 & n. 4-5 (11th Cir. 1989) (per curiam) (error harmless where no significant nonstatutory mitigating evidence existed and where counsel purposely presented no nonstatutory mitigating evidence), *cert. denied,* 110 S.Ct. 1834 (1990); *Jones v. Dugger,* 867 F.2d 1277, 1279-80 (11th Cir. 1989) (error not harmless where evidence of prison rehabilitation not considered); *Clark v. Dugger,* 834 F.2d 1561, 1569-70 (error harmless where trial counsel made strategic decision not to introduce any mitigating evidence), *cert. denied,* 485 U.S. 982, 108 S.Ct. 1282 (1988); *Magill v. Dugger,* 824 F.2d 879, 893-95 (11th Cir. 1987) (error not harmless where evidence of remorse excluded).

From these decisions, a *Hitchcock* error will not be found harmless if the evidence excluded from the jury's sentencing deliberations by a limiting instruction could have had any effect on the jury's recommendation. *See Skipper v. South*

Carolina, 476 U.S. 1, 8, 106 S.Ct. 1669, 1673 (1986) (*Lockett* violation not harmless because Court could not "confidently conclude" that the excluded evidence "would have had no effect upon the jury's deliberations"). In situations where counsel has made a strategic choice not to introduce any mitigating evidence, it is clear that *Hitchcock* violations are harmless: "Having failed to produce evidence of any nonstatutory mitigating factors, [petitioner] can hardly complain that the trial court restricted the jury's ability to consider them." *Clark,* 834 F.2d at 1570. Likewise, where no true mitigating evidence exists, *Hitchcock* is not implicated. *See, e.g., Demps,* 874 F.2d at 1396 (Clark, J., specially concurring) ("Where there is no nonstatutory mitigating evidence there can be no *Hitchcock* error and harmlessness need not be considered.").

In petitioner's case it is clear beyond cavil that significant nonstatutory mitigating factors were excluded from the jury's consideration by the erroneous jury charge. Booker was the only defense witness at the sentencing phase of the trial, and he testified that he had been hospitalized for psychiatric reasons nine times beginning at age 13, that he had severe problems with alcohol and drugs and had experienced blackouts, and that he was honorably discharged from the Army. He said he could not remember the crime, but that if he did it he felt remorseful. He also stated, against counsel's advice, that someone who had committed this type of crime should receive the death penalty. Although no psychiatric testimony was presented during sentencing, Booker did call one psychiatrist during the guilt phase of his trial; the testimony adduced showed that, although Booker was not insane, his records from Walter Reed Army Medical Center indicated that Booker suffered from an organic brain disorder as a result of drug use. The psychiatrist also testified that there were indications of paranoid schizophrenia. The police officer who took Booker's confession testified that Booker seemed to have a split personality when he

confessed. Booker assumed the identity of "Aniel"; he said that "Steve" committed the murder; he clenched his teeth so hard they cracked; and he laughed and cried uncontrollably. The officer stated that he did not think Booker was faking.[1] There was also evidence that Booker was cooperative with the police, and that he may have made the anonymous phone call reporting the murder.

After the jury recommended death by a 9-to-3 vote, the trial judge was presented with other evidence prior to passing sentence. This evidence included the report of a court-appointed psychiatrist. This report concluded that Booker had above normal intelligence but was impulsive and had difficulty postponing gratification. It also noted that Booker had had little supervision as a child, that he began drinking and using drugs as a teenager, and that he had experienced hallucinations. The psychiatrist concluded that Booker was not under extreme emotional duress or the domination of another at the time of the crime. But due in part to intoxicants he had consumed, Booker was "most probably...less able than the average individual to conform his conduct to the requirements of the law."

The *Delap* case presents very similar circumstances. Both Delap and Booker expressed remorse for their crimes and cooperated with the authorities. *Delap,* 890 F.2d at 306. More significantly, there was considerable evidence that Delap, like Booker, suffered from an organic brain disorder. *Id.* In *Delap,* this court noted that "[t]here was substantial and significant psychological evidence which the jury, if it followed the court's instruction, would have considered only if it rose to the level of a statutory mitigating factors; i.e., only if the jury found that Delap committed the crime 'under the influence of *extreme* mental or emotional disturbance.' Fla.Stat. § 921.141(6)(b)(1977)(emphasis added)....Had the

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1 The trial court judge found that this evidence was self-serving.

jury been properly instructed, it may have considered the psychological evidence in mitigation even if it did not find that the evidence met the required threshold level for a statutory mitigating factor." *Delap,* 890 F.2d at 305-06. Comparably, Booker's jury may have found that his psychiatric nonstatutory mitigating evidence did not rise to the level of the Florida statutory mitigating circumstances.[2] The *Delap* court also found significant the fact that at least one juror voted for life imprisonment, *id.* at 306, whereas three of Booker's jurors voted for life.

Thus there was available, nonstatutory mitigating evidence that was not considered by the sentencing jury or judge due to the *Hitchcock* violation.[3] Because we are not able to speculate as to the effect this substantial evidence would have had on the sentencing body, we cannot find the

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2 Booker's prosecutor argued that none of the mitigating circumstances, including the "extreme mental or emotional disturbance" factor, applied. The trial judge found no statutory mitigating factors.

3 In addition to the evidence that was presented but was not considered, evidence existed that could have been submitted at the sentencing phase if counsel had not believed that the law limited him to statutory mitigating circumstances. *See Knight v. Dugger,* 863 F.2d 705, 759 (11th Cir. 1988) (Clark, J., concurring). The examining psychiatrists could have been called to testify concerning Booker's mental health history. This history included (1) a brief commitment at the age of 14 because he had choked his dog and hit his mother; (2) treatment at Walter Reed for several months; (3) a seizure while in prison and treatment with Dilantin; (4) hallucinations during childhood; and (5) two suicide attempts in jail following the murder. Other possible nonstatutory mitigating evidence included educational and institutional records showing Booker's artistic ability, drinking problems, and schizophrenia.

error harmless, regardless of the number of aggravating circumstances that may have been found. *See Knight,* 863 F.2d at 710.[4]

The state of Florida has not shown the existence of harmless error beyond a reasonable doubt. Accordingly, the order of the district court is AFFIRMED.

TJOFLAT, Chief Judge, specially concurring:

While I agree that we must affirm the district court's order in this case, I believe that, as a preliminary matter, the court should have considered whether the Florida Supreme Court resentenced Booker or merely reviewed his sentence under harmless error analysis. In *Clemons v. Mississippi,* ____ U.S. ____, 110 S.Ct. 1441 (1990), the United States Supreme Court recognized that state appellate courts may act as resentencers and thereby cure constitutional defects that occur in the state trial courts. The Florida Supreme Court, in accordance with *Clemons,* could have acted as a resentencer in this case, weighing the nonstatutory mitigating evidence that the trial court ignored. If the court adopted this role, it erased any prejudice caused by the sentencing court's *Hitchcock* error—an error that otherwise would be fatal to the State's claim. In my view, since the outcome of this case hinges on whether the Florida Supreme Court acted as an appellate sentencer or as a pure reviewing court, the Clemons issue merits our discussion.

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4 The state of Florida argues that this court must show deference to the Florida Supreme Court's determination that the error was harmless. Federal courts are not, however, bound by state court rulings on harmless error. *See, e.g., Grizzell v. Wainwright,* 692 F.2d 722, 725 (11th Cir. 1982), *cert. denied,* 461 U.S. 948, 103 S.Ct. 2129 (1983).

I. The *Hitchcock* Claim

Petitioner claims that as a result of the prosecutor's closing argument and the trial judge's instructions at the sentencing phase of his trial, the advisory jury failed properly to consider nonstatutory mitigating evidence in violation of *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821 (1987) (applying *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954 (1978), to the Florida capital sentencing scheme).[1] On direct petition for a writ of habeas corpus, the Florida Supreme Court denied Booker relief, the court agreed that *Hitchcock* error had occurred but held that the error was harmless. *Booker v. Dugger,* 520 So.2d 246, 247, 249 (Fla.), *cert. denied,* 486 U.S. 1061, 108 S.Ct. 2834 (1988). On federal habeas review, the district court granted Booker relief—a new sentencing hearing. Applying a harmless error standard, the district court held that the State had not shown beyond a reasonable doubt that the *Hitchcock* error did not affect the outcome of Booker's sentencing proceeding. The State appeals from the district court's grant of relief, arguing that the error was in fact harmless.[2]

As noted by the majority, a *Hitchcock* error is harmless only if we conclude that the excluded evidence would have had no effect on the jury or the sentencing judge. *See Hitchcock,* 481 U.S. at 399, 107 S.Ct. at 1824. Under the strict criterion of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967), which governs harmless error analysis, "[t]he error must be harmless beyond a reasonable doubt." *Demps v. Dugger,* 874 F.2d 1385, 1389-90 (11th Cir. 1989), *cert. denied,* ____ U.S. ____, 110 S.Ct. 1834 (1990). For a *Hitchcock* error to be harmless under this standard, "the court must determine beyond a reasonable doubt that the proposed mitigating evidence...would not have influenced the jury to recommend [or the trial judge to impose] a life sentence." *Id.* at 1390; *see Jones v. Dugger,* 867 F.2d 1277, 1279 (11th Cir. 1989) (state must prove beyond reasonable

doubt that error "did not contribute to the jury's sentencing recommendation"); *Clark v. Dugger,* 834 F.2d 1561, 1569 (11th Cir. 1987) (error "could not have affected" sentence), *cert. denied,* 485 U.S. 982, 108 S.Ct. 1282 (1988); *Magill v. Dugger,* 824 F.2d 879, 894 (11th Cir. 1987) (errors must have "had no effect" on decision). Thus, unless we can say for sure that the error at issue would have made no difference to the outcome of the sentencing hearing, we cannot hold that the error was harmless. If, without such certainty, we were to hold an error harmless, our decision would be arbitrary and would present a serious constitutional problem.

The majority today limits its harmless error inquiry to what the *jury*[3] might have done had it been properly instructed to consider the nonstatutory evidence that Booker presented. In my view, the Supreme Court's recent decision in *Clemons v. Mississippi,* ____ U.S. ____, 110 S.Ct. 1441 (1990), and several cases cited therein, requires us at least to investigate the Florida Supreme Court's role in this case and determine whether it acted as an appellate sentencer. Because the Florida Supreme Court was presented with all of the mitigating evidence that counsel failed to present to the jury, if the court did act as an appellate sentencer, there is no reasonable probability that, absent the *Hitchcock* error, the result of the sentencing proceeding would have been different.[4]

I begin my analysis by discussing the state appellate court's independent sentencing role, as recognized by Supreme Court caselaw, in capital sentencing schemes. I then show that although the Florida Supreme Court sometimes acts as a resentencer, here it merely reviewed the district court's sentence for constitutional infirmity.

II. The State Appellate Court as Sentencer

A.

The notion that a state appellate court could act as an independent sentencer without violating the Constitution appears to have originated in *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733 (1983). In *Stephens,* the jury found three statutory aggravating circumstances from the evidence and recommended that Stephens be sentenced to death. The trial court, being bound by the jury's recommendation, imposed the death sentence.[5] While Stephens' appeal was pending in the Georgia Supreme Court, that court, in *Arnold v. State,* 224 S.E.2d 386 (Ga. 1976), struck down one of the three statutory provisions on which the jury had relied in recommending that he be sentenced to death. Then, in Stephens' appeal, the Georgia Supreme Court affirmed Stephens' sentence, concluding that the two remaining aggravating circumstances supported his sentence. *Stephens v. State,* 227 S.E.2d 261, 263 (Ga. 1976).

Stephens then petitioned a federal district court for a writ of habeas corpus, contending that the Georgia Supreme Court could not predict what the outcome of the sentencing hearing would have been had the jury not relied on the invalid aggravating circumstance. Therefore, according to Stephens, the Georgia Supreme Court acted arbitrarily in affirming his sentence and should have remanded his case to the trial court for a new sentencing hearing. The federal district court denied Stephens' petition, but the Fifth Circuit reversed and issued the writ. The Fifth Circuit concluded that "[i]t is impossible for a *reviewing court* to determine satisfactorily that the [jury's] verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." *Stephens v. Zant,* 631 F.2d 397, 406 (5th Cir. 1980) (emphasis added), *modified in part,* 648 F.2d 446 (5th Cir. June 1981) (per curiam). Thus, the Fifth Circuit treated the Georgia Supreme Court as a pure

reviewing court—one that can point out constitutional error in the sentencing proceeding but that cannot cure those errors by independently sentencing the defendant. Consequently, the Fifth Circuit held Georgia's sentencing scheme, as applied in *Stephens,* unconstitutional.

The United States Supreme Court initially found that it could not discern the basis upon which the Georgia Supreme Court had affirmed Stephens' sentence and therefore could not tell whether the court had acted arbitrarily and denied Stephens the due process of law. The Court consequently certified a question of state law to the Georgia Supreme Court, asking it to explain the state law premise upon which it based its affirmance of Stephens' sentence. *Zant v. Stephens,* 456 U.S. 410, 102 S.Ct. 1856 (1982).

When the Georgia Supreme Court answered the certified question, the Court concluded that Georgia's capital sentencing scheme, which allowed the Georgia Supreme Court to affirm a sentence after one or more aggravating circumstances had been invalidated, was constitutional as applied in Stephens' case. The Court carefully reviewed Georgia's capital sentencing scheme, noting first that the trier of fact (the jury) is required to find the existence of aggravating and mitigating circumstances. No defendant is eligible for the death penalty unless the jury finds at least one statutory aggravating circumstance. *See Stephens,* 462 U.S. at 871, 103 S.Ct. at 2739-40. Once such an aggravating circumstance is found, the jury has " 'absolute discretion' " in deciding whether to impose the death penalty. *See id.,* 103 S.Ct. at 2740 (quoting *Zant v. Stephens,* 297 S.E.2d 1, 3 (Ga. 1982)).

In the case before it, the Court found that the evidence admitted to establish the invalid statutory aggravating circumstance still would have been fully admissible in the sentencing phase under another Georgia statute. *Id.* at

886-87, 103 S.Ct. at 2747-48. The Court then noted that the invalid circumstance "arguably might have caused the jury to give somewhat greater weight to [the evidence]." *Id.* at 888, 103 S.Ct. at 2749. Nevertheless, the Court concluded that the Georgia Supreme Court did not err in finding the impact of the improper labeling to be inconsequential. *Id.* at 888-89, 103 S.Ct. at 2749.

This holding is puzzling at first given (1) the jury's *absolute discretion* in deciding whether to impose the death penalty and (2) the Court's finding that the invalid label might have influenced the jury's decision-making process. How can a pure reviewing court decide that a jury with absolute discretion would not have reached a different conclusion under admittedly different circumstances? I submit that it cannot. As I have stated on another occasion, a state scheme that allows a reviewing court "to affirm a sentence when it cannot tell whether the...sentencing court would have imposed the same sentence absent the error found on review" raises serious problems of arbitrary review. *Ford v. Strickland,* 696 F.2d 804, 837 (11th Cir.) (en banc) (Tjoflat, J., concurring in part and dissenting in part), *cert. denied,* 464 U.S. 865, 104 S.Ct. 201 (1983). Therefore, the Court's holding can be understood only in light of a key statement: "Our decision in this case depends in part on the existence of...the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." *Stephens,* 462 U.S. at 889-90, 103 S.Ct. at 2749. Thus, the Court was willing to allow the Georgia Supreme Court to do something the Fifth Circuit would not allow, i.e., to "cure" any uncertainty remaining after harmless error review by independently finding the sentence to be proportionate to sentences imposed in other cases. *See Ford,* 696 F.2d at 837 (Tjoflat, J., concurring in part and dissenting in part). In essence, the Court approved a certain degree of appellate sentencing.[6]

The idea of appellate sentencing was further developed in *Cabana v. Bullock,* 474 U.S. 376, 106 S.Ct. 689 (1986). In *Bullock,* the Court addressed the question whether an *Enmund* finding (that the defendant has killed, attempted to kill, or intended that a killing take place or that lethal force be employed) can be made only by a jury or whether the finding can be made at some other step in the state's criminal process. *See Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368 (1982). The Court held, in *Bullock,* that *Enmund* did not add any elements to the state's substantive offense; it merely defined the class of persons that, under the eighth amendment, could be sentenced to death. *See Bullock,* 474 U.S. at 385, 106 S.Ct. at 696. The Court went on to hold that, although an *Enmund* finding requires a factual determination, "[t]he State has considerable freedom to structure its capital sentencing system as it sees fit" and that the finding may be made by any state court "that has the power to find the facts and vacate the sentence." *Id.* at 386-87, 106 S.Ct. at 697.

Stephens and *Bullock,* taken together, implicitly support the proposition that state appellate courts, consistent with the eighth amendment, may independently reweigh evidence and sentence capital defendants. The Supreme Court, however, recently made this implicit holding explicit in *Clemons v. Mississippi,* ____ U.S. at ____, 110 S.Ct. at 1441.

B.

Chandler Clemons, convicted of capital murder in Mississippi state court, was sentenced to death. The jury, in mandating the death penalty,[7] found two aggravating circumstances: (1) the murder was committed during the course of a robbery or for pecuniary gain and (2) the murder was "especially heinous, atrocious or cruel." *Id.* at ____, 110 S.Ct. at 1445. On direct appeal to the Mississippi Supreme Court, the court noted that the "especially heinous"

circumstance had been held unconstitutionally vague in *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853 (1988). *See Clemons v. State,* 535 So.2d 1354, 1362 (Miss. 1988). In *Maynard,* the United States Supreme Court refused to reinstate the death penalty because "the Oklahoma Court of Criminal Appeals would not attempt to save the death penalty when one of several aggravating circumstances found by the jury was found invalid." 486 U.S. at ____, 108 S.Ct. 1860. The Mississippi Supreme Court, however, distinguished *Maynard from the case before it because:*

> [the Mississippi Supreme] Court has placed a limiting construction on the aggravating circumstance of "especially heinous, atrocious or cruel;"... Mississippi law holds one invalid aggravating circumstance will not suffice to overturn a death penalty where one or more valid aggravating circumstance(s) remains;...brutal and torturous facts surround[ed] the murder...;...narrowing instructions [were] given to the jury by the lower court;...[and] beyond a reasonable doubt...the jury's verdict would have been the same with or without the "especially heinous, atrocious or cruel" aggravating circumstance.

Clemons, 535 So.2d at 1364.

Clemons argued before the United States Supreme Court that, in affirming the death sentence, the Mississippi Supreme Court engaged in an independent weighing of the (valid) aggravating and mitigating circumstances[8] in violation of the sixth and eighth amendments. The Court held, however, that neither the sixth amendment,[9] eighth amendment,[10] nor any other constitutional provision prohibits a state appellate court from independently weighing aggravating and mitigating circumstances.

In refuting Clemons' eighth amendment argument, the Court held that appellate weighing of aggravating and mitigating circumstances was perfectly consistent with the goals of measured consistent application of the state's death penalty and fairness to the defendant. Indeed, such appellate weighing occurs in a state appellate court's proportionality review. *See Clemons,* ____ U.S. at ____, 110 S.Ct. at 1448. Thus, the Court concluded "that state appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime." *Id.* at ____, 110 S.Ct. at 1449.

Despite this holding, the Court remanded the case to the Mississippi Supreme Court. According to the Court, it could not tell whether the Mississippi Supreme Court had (1) conducted an individualized weighing of the aggravating and mitigating circumstances, (2) applied a state rule that required automatic affirmance of the death penalty when at least one valid aggravating circumstance remains, or (3) applied the harmless error analysis of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967). *See Clemons,* ____ U.S. at ____, 110 S.Ct. at 1449-51.

The language in the Mississippi Supreme Court opinion is ambiguous—portions of it are consistent with each of the three approaches, but it does not completely correspond with any of them. For example, in conducting its proportionality review, the court determined that "[i]n our opinion...the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other...." *Clemons,* 535 So.2d at 1365. This remark suggests that the Mississippi Supreme Court reweighed the aggravating and mitigating circumstances in this case—presumably by applying the proper definition to the "especially heinous" factor—and concluded that Clemons still should be sentenced to death. Alternatively,

however, the court may have disregarded the "especially heinous" factor and affirmed on the ground that, as a matter of law, a single valid aggravating factor supports a sentence of death. In accordance with this approach, the court noted that its precedent "established unequivocally...that when one aggravating circumstance is found to be invalid or unsupported by the evidence, a remaining valid aggravating circumstance will nonetheless support the death penalty verdict." *Id.* at 1362. While this language may imply merely that the Mississippi courts do not *automatically* invalidate a death sentence when an aggravating circumstance is found to be invalid, it arguably indicates that Mississippi appellate courts affirm all death sentences that are supported by at least one valid aggravating circumstance. Finally, in another portion of the opinion, the court's language corresponds with *Chapman* harmless error analysis. According to the Mississippi Supreme Court, it was *"beyond a reasonable doubt* that the jury's verdict would have been the same with or without the 'especially heinous, atrocious or cruel' aggravating circumstance." 535 So.2d at 1364 (emphasis added); *see Clemons,* ____ U.S. ____, 110 S.Ct. at 1451.[11] Because of the ambiguity, the Court remanded the case to the Mississippi Supreme Court for further proceedings and, presumably, for a determination of the basis upon which Clemons' sentence was affirmed.

Clemons thus stands for the proposition that state appellate courts in weighing states[12] may independently weigh aggravating and mitigating circumstances and thereby cure certain errors that might have occurred at the sentencing phase of a trial; they may act as sentencers. The question then becomes whether the Florida Supreme Court acted as a sentencer in the case at hand.

III. The Florida Supreme Court as Sentencer

Given the holding of *Clemons* and the cases preceding it, we know that the Florida Supreme Court constitutionally may act as a sentencer by independently reweighing aggravating and mitigating circumstances. I show in this section that although the Florida Supreme Court sometimes has assumed this role, it did not purport to do so on this occasion.

A.

The Florida Supreme Court has stated several times that it does not reweigh evidence when reviewing a death sentence. *See, e.g., Hudson v. State,* 538 So.2d 829, 831 (Fla.), *cert. denied,* ___ U.S. ___, 110 S.Ct. 212 (1989). In *Brown v. Wainwright,* 392 So.2d 1327 (Fla.) (per curiam), *cert. denied,* 454 U.S. 1000, 102 S.Ct. 542 (1981), the court stated unequivocally that its "role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition.' " *Id.* at 1331. According to the court, it has two discrete functions, the first involving review of the procedural history of the case and second involving proportionality review. *Id.* The court went on to explain that

> [n]either of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances.... If the findings of aggravating and mitigating circumstances are...supported [by the record], if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even

> though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

Id. (footnote omitted).

Despite the Florida Supreme Court's protestations to the contrary, the court has engaged in what the United States Supreme Court would term "sentencing" or "reweighing." First, the Florida Supreme Court, like the Mississippi Supreme Court, engages in proportionality review on direct appeal. *See id.* As the Court in *Clemons* noted, proportionality review requires "weighing aggravating and mitigating evidence." ____ U.S. at ____, 110 S.Ct. at 1448; *see Ford,* 696 F.2d at 837 (Tjoflat, J., concurring in part and dissenting in part) (proportionality review is a form of sentencing because court considers sentencing standards not considered by the original sentencer). In essence, proportionality review involves comparing the balance between aggravating and mitigating circumstances in the case at hand with the balance in other cases (not considered by the jury in recommending, or the trial judge in fashioning, the sentence to be given) in which the death penalty has been imposed. Thus, the court uses its prior cases to establish sentencing norms with which it tests each new case. Such a normative process, by definition, requires the court to weigh aggravating and mitigating circumstances—circumstances, moreover, that are not considered by the advisory jury and sentencing judge.

Furthermore, the Supreme Court has expressly recognized an instance in which the Florida Supreme Court acted as an independent sentencer or reweigher. In *Wainwright v. Goode,* 464 U.S. 78, 104 S.Ct. 378 (1983) (per curiam), the state trial judge may have relied on an aggravating factor that was not included in Florida's statutory list of permissible aggravating factors.[13] After his sentence was affirmed on direct appeal, *Goode v. State,* 365 So.2d 381 (Fla. 1978),

Goode unsuccessfully sought habeas corpus relief in the Florida Supreme Court, *Goode v. Wainwright,* 410 So.2d 506 (Fla. 1982) (per curiam). Goode sought the same relief in federal district court, and it too denied him the writ. This court, however, reversed and granted Goode relief on the ground that his sentence was imposed in an arbitrary and capricious manner because the trial judge considered an impermissible aggravating circumstance. *Goode v. Wainwright,* 704 F.2d 593 (11th Cir. 1983). The Supreme Court, however, took a different approach. It first noted that on direct appeal to the Florida Supreme Court, the court independently weighed the evidence in the case and compared the aggravating and mitigating circumstances with those in other cases. 464 U.S. at 86, 104 S.Ct. at 383 (the Florida Supreme Court had stated: "Comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence." 365 So.2d at 384-85). The Court then held that

> [w]hatever may have been true of the sentencing judge, there is no claim that in conducting its *independent reweighing of the aggravating and mitigating circumstances* the Florida Supreme Court considered [the impermissible aggravating circumstance]. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

Id. at 86-87, 104 S.Ct. at 383 (emphasis added). In essence, the Supreme Court held that the Florida Supreme Court had acted as a reweigher or sentencer and thereby cured the error committed by the trial judge.

We learn from these cases an important lesson: the Florida Supreme Court's definition of "sentencer" and "reweigher" is different from the United States Supreme Court's definition of those terms. For example, although the Florida Supreme Court has stated that it never reweighs aggravating and mitigating circumstances, the United States Supreme Court has stated that a form of reweighing occurs every time a state court conducts proportionality review. Additionally, the Supreme Court has held that a state appellate court, by independently reweighing the aggravating and mitigating circumstances, may cure constitutional sentencing errors. Consequently, we must analyze what the Florida Supreme Court did in this case, not necessarily what it says it has done in prior cases, particularly since the court has not had an opportunity to characterize its role in light of *Clemons*.

B.

In light of these principles of interpretation, I analyze what the Florida Supreme Court did in this case. In characterizing the *Hitchcock* error at issue, the Florida Supreme Court found that the jury had heard all of the defendant's mitigating evidence but that, because of the prosecutor's arguments and the judge's instructions, the jury considered this evidence exclusively within the statutory categories.[14] According to the court, Booker argued that, "even though the evidence concerning his mental and emotional condition did not rise to the level of statutory mitigating circumstances, with the proper instructions the jury would have found it sufficient to recommend against death, and the judge would have accepted the jury's recommendation." *Booker*, 520 So.2d at 249. The court rejected this argument because in its view, even without the erroneous instruction and the prosecutor's comment, the jury would still have recommended death and the judge would still have accepted its recommendation. *Id.* "[I]t would be unreasonable," the

court held, "to conclude that even though the jurors did not find the mitigating evidence strong enough to offset the aggravating circumstances and thereby recommend life imprisonment, they would have done so had they realized that the same evidence could be considered as nonstatutory as well as statutory mitigation." *Id.*

The court's holding, that Booker was not prejudiced by the trial court's *Hitchcock* error, represents a substantial departure from the very cautious approach to second-guessing the jury exhibited in other Florida Supreme court cases. In accordance with those prior decisions, the court could not hold that if the jury had heard all of the nonstatutory mitigating evidence and considered it independently of the statutory categories, it still would have recommended the death penalty.[15] Nor could the court be sure that, absent the *Hitchcock* error, the judge would have sentenced Booker to death whatever the jury's recommendation might have been. According to its caselaw, the court should have determined that the error was prejudicial and have granted the writ.

Two explanations can be posited for this judicial aberration. The first is that the Florida Supreme Court, acting as a pure reviewing court, conducted harmless error analysis and simply acted arbitrarily—this is the position implicitly adopted by the majority.[16] If this explanation is correct, then it follows that the majority's conclusion is also correct. I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached.

The second explanation is that the Florida Supreme Court reweighed the aggravating and mitigating circumstances in this case—including the nonstatutory mitigating circumstances that the advisory jury and sentencing judge failed to consider—and concluded that Booker still should be sentenced to death. The Supreme Court's decision in Clemons recognizes that a state appellate court can resentence and thereby cure trial court error—the Florida Supreme Court could have exercised this power, resentencing Booker and curing the sentencing court's *Hitchcock* error. Although the court's result more closely corresponds with this approach than with a harmless error approach, it is clear that, in framing its analysis, the court undertook a purely reviewing function. After determining that a *Hitchcock* error occurred during the sentencing phase of the case, the court states that, "the only remaining question is whether such error can be considered *harmless*." *Id.* at 248 (emphasis added). It then concluded:

> We are convinced beyond a reasonable doubt that even with the proper jury instruction and without the prosecutor's compounding comment, the jury would not have made a recommendation for life imprisonment. There was simply no nonstatutory mitigating evidence sufficient to offset the aggravating circumstances upon which the jury could have reasonably predicated such a recommendation. We are also convinced beyond a reasonable doubt that the judge would have sentenced Booker to death regardless of the jury's recommendation and that an override would have been consistent with the rationale of *Tedder v. State.*

Id. at 249 (citation omitted).[17] Taken as a whole, the Florida Supreme Court's opinion demonstrates that the court only intended to undertake harmless error analysis of the *Hitchcock* error—an analysis that the court conducts in its

capacity as a pure reviewing court under the strict criterion of *Chapman v. California*. Under this analysis, unless the court can say for sure that the error at issue would have made no difference to the outcome of the sentencing hearing, then the court cannot hold that the error was harmless. If, without such certainty, the court holds an error harmless, its decision is arbitrary and, therefore, unconstitutional. That is the conclusion that I must reach in this case. Although the Florida Supreme Court had the power to resentence Booker and cure the error, it chose not to exercise it.

When an appellate court purports to act only as a pure reviewing court under *Chapman,* we will not articulate a state law premise that would have allowed that court constitutionally to reach the same result—that is the state appellate court's responsibility. Only where some ambiguity surrounds the court's rationale and we are therefore unable to frame the federal constitutional question at issue will we remand the case, as in *Clemons,* to the state court and allow it to articulate which approach it adopted. Here, there simply was no ambiguity.

C.

After carefully reviewing the Florida Supreme Court's opinion in this case, it is obvious that the court conducted harmless error review of Booker's death sentence. Since the court could not determine with certainty what the jury's recommendation or the judge's decision would have been if the nonstatutory mitigating evidence had been considered properly, I believe that, in accordance with the majority opinion, we must affirm the district court's disposition of the case.

---

1 The exact nature of this *Hitchcock* error remains somewhat uncertain. The Supreme Court of Florida, in characterizing the error, found that the jury had heard all of the mitigating evidence during the sentenc-

ing phase of petitioner's trial but that the prosecutor's arguments and the judge's instructions forced the jury to try to evaluate that evidence within the statutory categories of mitigating circumstances, *see* Fla.Stat. § 921.141(6) (1990), when they should have directed the jury to give the evidence independent weight. In this appeal, however, Booker argues that, because of the sentencing judge's view—as articulated in his written findings and conclusions respecting the aggravating and mitigating circumstances in the case—that only statutory mitigating circumstances counted, his defense attorney entirely failed to develop or present to the jury or, later, at sentencing, to the judge certain mitigating evidence that would not fit within the statutory categories. As the majority points out, if Booker's argument is right, then not only did the jury and the trial judge fail to give independent weight to some nonstatutory mitigating evidence that might have been before them (disguised, of course, as statutory mitigating circumstances), but they did not consider other pieces of nonstatutory mitigating evidence at all.

2 The State also argues that Booker's *Hitchcock* claim is barred under the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 86-87, 97 S.Ct. 2497, 2506 (1977), because Booker failed to comply at trial with Florida's contemporaneous objection rule. This argument is obviously meritless. The Florida Supreme Court has already addressed the merits of Booker's *Hitchcock* claim, and we have consistently held that claims addressed on the merits by a state court are not barred from federal habeas review. *See Mann v. Dugger*, 844 F.2d 1446, 1448, n.4 (11th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 1353 (1989); *Cooper v. Wainwright*, 807 F.2d 881, 886-87 (11th Cir. 1986) (per curiam), *cert. denied*, 481 U.S. 1050, 107 S.Ct. 2183 (1987); *Oliver v. Wainwright*, 795 F.2d 1524, 1528-29 (11th Cir. 1986), *cert. denied*, 480 U.S. 921, 107 S.Ct. 1380 (1987); *see also Messer v. Florida*, 834 F.2d 890, 892-93 (11th Cir. 1987) (because Florida treated *Hitchcock's* holding as a significant change in the law that excused a procedural default, that claim was not defaulted in federal habeas proceedings; "When the state court has declined to rely upon a procedural default or when its procedural default rule has been only sporadically invoked, the procedural default no longer bars consideration of the issue in federal court." (citations omitted); *Hargrave v. Dugger*, 832 F.2d 1528, 1536-39 (11th Cir. 1987) (en banc) (Tjoflat, J., specially concurring), *cert. denied*, ____ U.S. ____, 109 S.Ct. 1353 (1989).

3 In Florida, the jury offers only an advisory opinion as to whether the death sentence should be imposed; the trial judge has the primary responsibility for determining what sentence should be imposed under Florida's capital sentencing scheme. *See* Fla.Stat. § 921.141(2)-(3).

4 Booker claims that the jury and sentencing judge did not hear *all* of the nonstatutory mitigating evidence. *See supra* note 1. Booker asserts that, because of the sentencing judge's view that only statutory mitigating circumstances counted, his defense attorney did not develop or

present certain mitigating circumstances that did not fall within the statutory categories. According to the district court, although the sentencing judge had access to all of the mitigating evidence, he did not consider it independently but only to determine whether it fell within the statutory categories. The Florida Supreme Court, however, did consider all of the mitigating evidence, statutory as well as nonstatutory.

The significance of this issue—whether the jury and sentencing judge in fact heard all the mitigating evidence—depends on the Florida Supreme Court's function. If, under a valid state law premise, the court functioned as a resentencer, then the issue becomes irrelevant. As long as the court itself considered all of the nonstatutory mitigating circumstances, its resentencing would be free of *Hitchcock* error, and Booker would have no federal constitutional claim. On the other hand, if the court functioned in a purely reviewing capacity, then the issue becomes significant. The jury's and judge's failure to hear all of the nonstatutory mitigating evidence would add to the uncertainty of how that evidence would have affected the sentencing hearing's outcome and therefore would also add to the arbitrariness of the reviewing court's decision that the error was harmless.

5 In Georgia, the recommendation of the jury is binding on the trial judge. *See* Ga. Code Ann. § 17-10-31 (1990).

6 The Court declined to "express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme [like Florida's] in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." *Stephens*, 462 U.S. at 890, 103 S.Ct. at 2750. The Court answered this question in *Clemons*. *See infra* pp. 9-12.

7 In Mississippi, the jury decides whether the death sentence is to be imposed. *See* Miss. Code Ann. § 99-19-101 (Supp. 1990).

8 In both Mississippi and Florida, a death sentence may be imposed only when the aggravating circumstances "outweigh" the mitigating circumstances. See Fla.Stat. § 921.141(2), (3) (1989); Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1990). Mississippi and Florida are therefore known as "weighing" states.

9 Clemons argued that the Mississippi Supreme Court, in affirming his sentence, denied him his right to a trial by jury, as guaranteed by the sixth amendment and made applicable to the states through the fourteenth amendment.

10 Clemons argued that the Mississippi Supreme Court, in affirming his sentence, acted arbitrarily, in violation of the eighth amendment as applied to the states through the fourteenth amendment.

11 The court, however, never referred specifically to "harmless error analysis" nor did their conclusion—that the error was harmless—conform with Mississippi Supreme Court precedent. And even if the court did conduct harmless error analysis, it is still unclear whether it held that the sentence would have been the same even if there had been no "especially heinous" instruction or that the sentence would have been the same even if the especially heinous aggravating circumstance had been properly defined in the jury instructions. *See Clemons*, ____ U.S. ____, 110 S.Ct. at 1451.

12 *See supra* note 8.

13 *See* Fla.Stat. § 921.141(5).

14 *See supra* note 1.

15 In fact, several Florida Supreme Court cases suggest, seemingly as a matter of law, that when one aggravating circumstance is invalidated and there is some evidence of mitigation a death sentence should be vacated and the case should be remanded for a new sentencing hearing. *See e.g., Long v. State*, 529 So.2d 286, 293 (Fla. 1988) (per curiam); *Menendez v. State*, 368 So.2d 1278, 1282 (Fla. 1979); *Riley v. State*, 366 So.2d 19, 22 (Fla. 1978) (per curiam); *Elledge v. State*, 346 So.2d 998, 1002-03 (Fla. 1977). In those cases, the court reasoned that it could not affirm the sentence because it simply could not know for sure what the advisory jury and, later, the sentencing judge would have done in the absence of the invalidated aggravating circumstances. Therefore, it could not find the error harmless.

16 The majority, by omitting discussion of the *Clemons* issue, perhaps assumes that Florida's high court always acts as a pure reviewing court. This position is untenable, however, in light of *Goode v. Wainwright*, in which the United States Supreme Court held that the Florida Supreme Court acted as a resentencer as that term is understood by the Court.

17 This language should be contrasted with that utilized by the state supreme courts in *Clemons* and *Goode;* in both of those cases, the state supreme court suggested that, in conducting its proportionality review on direct appeal, the court intended or may have intended to reweigh the aggravating and mitigating circumstances in a manner that would have cured the constitutional defect that arose in the trial court. In *Goode*, for example, the Florida Supreme Court stated that "[c]omparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence." 365 So.2d at 384-85. And in *Clemons*, the Mississippi Supreme Court stated that "[i]n our opinion ... , the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other." 535 So.2d at 1365.

This type of ambiguous language is not found in the present case. Here, the court carefully delineated its discussion in accordance with harmless error review.

It is of no moment, however, that the present proceedings involve a collateral attack on Booker's sentence rather than a direct appeal of it. When the court holds that new mitigating evidence would not have swayed the advisory jury and sentencing judge, it also should hold that on direct appeal it would have affirmed the sentence in light of the new evidence. Surely it would be anomalous for the Florida Supreme Court to uphold a sentence of death in collateral proceedings that it would not have upheld on direct appeal.

Thus, the supreme court, after finding that the *Hitchcock* error was harmless, logically should have determined, as a second step, whether Booker's death sentence was proportionate to the death sentences in its other cases, considering the nonstatutory mitigating evidence that the trial court ignored. If the court had undertaken this type of proportionality review in the habeas proceedings, then it might well have been acting as a resentencer under *Clemons*—just as it would have been if the case were before it on direct appeal. Here, however, the Florida Supreme Court did not purport to undertake any type of proportionality review, and that is how we also must approach the case.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STEPHEN TODD BOOKER,

Petitioner,

v. CASE TCA 88-40228-MMP

RICHARD L. DUGGER,

Respondent.

ORDER

This cause is before this Court upon Stephen Todd Booker's Petition for Writ of Habeas Corpus. Petitioner was convicted of murder and sentenced to death. He challenges the death sentence, asserting that his judge and advisory jury believed they were required to consider only statutory mitigating evidence. Petitioner claims this is contrary to the Supreme Court's decision in *Hitchcock v. Dugger,* 107 S. Ct. 1821 (1987).

The Florida Supreme Court considered the merits of Petitioner's Hitchcock challenged and denied relief. *Booker v. Dugger,* 520 So. 2d 246 (Fla.), *cert. denied,* 108 S.Ct. 2834 (1988). Therefore, there is no procedural bar to this Court's hearing the merits of Petitioner's case. *See Booker v. Wainwright,* 703 F.2d 1251, 1255 (11th Cir.), *cert. denied,* 464 U.S. 922 (1983). Likewise, no abuse of writ prevents this Court from considering the petition on the merits, because Hitchcock represents a significant change in the law. *See Moore v. Kemp,* 824 F.2d 847, 854 (11th Cir. 1987)

(previously litigated claim), *cert. granted sub. nom, Zant v. Moore,* 108 S. Ct. 1467) (11th Cir. 1985) (failure to assert a claim in a previous petition).

After an independent evaluation of the record, this Court has found the existence of *Hitchcock* error. Arguments of counsel during the sentencing phase and the judge's instruction to the advisory jury clearly directed the jury to consider only statutory mitigating factors in making its recommendation. The instructions given to the jury were almost identical to those held erroneous in *Hitchcock. See* Transcript of Sentencing Proceeding, vol.5 at 625.

Although the judge stated that he had considered all evidence presented at trial and the sentencing proceedings, including the defense memorandum addressing the then recent decision of *Lockett v. Ohio,* 438 U.S. 586 (1978), it is clear from the record that the judge did not independently consider all of this evidence. Instead, the judge considered the evidence only to determine whether it established a particular statutory mitigating factor. *See* Transcript of Sentencing Proceeding at 2-3. For example, the judge's treatment of the evidence of Petitioner's mental and emotional difficulties was very similar to another judge's treatment of such evidence in *Messer v. State of Florida,* 834 F.2d 890, 893-95 (11th Cir. 1987). In that case, the Eleventh Circuit found that the sentencing judge had not considered evidence of non-statutory mitigating circumstances, contrary to the Supreme Court's mandate in *Hitchcock. Id.* at 895. The *Hitchcock* error in Petitioner's case is equally clear from the record.

The Supreme Court did not address the issue of harmless error in its *Hitchcock* decision. *Hitchcock,* 107 S. Ct. at 1824. The Eleventh Circuit, however, has applied harmless error analysis to *Hitchcock* claims. *See Clark v. Dugger,* 834 F.2d 1561 (11th Cir. 1987); *Armstrong v. Dugger,* 833 F.2d 1430

(11th Cir. 1987), *cert. denied,* 108 S. Ct. 1282 (1988); *Magill v. Dugger,* 824 F.2d 879 (11th Cir. 1987). Therefore, this Court has applied harmless error analysis to this petition.

This Court is cautious about speculating on the effect of errors in capital sentencing proceedings, especially in light of the discretion given to the sentencer. *See Satterwhite v. Texas,* 108 S. Ct. 1792, 1797-98 (1988). In light of this caution, Respondent has failed to show beyond a reasonable doubt that errors in Petitioner's sentencing proceeding did not affect the outcome.

For the reasons stated, the Motion for Writ of Habeas Corpus is GRANTED. However, the Court will not issue the writ at this time conditioned on the State granting the defendant a new sentencing hearing in accordance with the dictates of *Lockett* and *Hitchcock, supra,* within a reasonable period of time. The warrant of execution is indefinitely stayed. The State, however, is not required to release the defendant, but shall continue his custody in the manner provided by law.

The Clerk of this Court is directed to notify the following individuals, by phone, of the granting of this stay of execution:

Governor of the State of Florida,
Attorney General of the State of Fla.
Warden, Florida State Prison, Raiford
Attorneys for Petitioner/Defendant
Attorneys for Respondent, and
Clerk, Eleventh Cir. Court of Appeals

DONE AND ORDERED this 16th day of September, 1988.

Maurice M. Paul
U.S. District Judge

Supreme Court of Florida

NO. 70,928

STEPHEN TODD BOOKER,
Petitioner,

vs.

RICHARD L. DUGGER, etc.,
Respondent.

[January 14, 1988]

PER CURIAM.

Stephen Todd Booker files this petition for writ of habeas corpus seeking to set aside the death sentence which has been imposed upon him. We have jurisdiction. Art. V., § 3(b)(9), Fla. Const.

Booker was convicted of burglary, sexual assault, and first-degree murder. Following a verdict of guilt, the jury recommended the death penalty by a nine-to-three vote. The trial judge's sentence of death was affirmed in *Booker v. State,* 397 So.2d 910 (Fla.), *cert. denied,* 454 U.S. 957 (1981). Our opinion in that case described the crime as follows:

> The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their

> contents strewn about the apartment. Fingerprints of the defendant were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.

Id. at 912.

Booker claims that he is entitled to relief under *Hitchcock v. Dugger,* 107 S.Ct. 1821 (1987), in which the United States Supreme Court found reversible error where the jury was instructed to consider only statutorily enumerated mitigating circumstances and where the trial judge declined to consider nonstatutory mitigating circumstances. Booker is not barred from raising this claim since *Hitchcock* represented a sufficient change in the law to defeat the suggestion of procedural default. *Thompson v. Dugger,* 515 So.2d 173 (Fla. 1987).

At the trial, Booker was not limited in his introduction of mitigating evidence. However, the prosecutor told the jury that the only mitigating circumstances which they should consider were those listed in the statute, and the court gave the jury substantially the same instruction on aggravating and mitigating circumstances which was deemed erroneous in *Hitchcock.* The record of the trial does not indicate whether the trial judge was aware of the relevance of any nonstatutory mitigating evidence. However, by the time of sentencing it appears that the judge was aware of the relevance of nonstatutory mitigating evidence because defense counsel, in a posttrial memorandum, referred to the recent decision of *Lockett v. Ohio,* 438 U.S. 586 (1978), and the judge acknowledged in the subsequent sentencing order that he had reviewed the sentencing memoranda. Nevertheless, in view of the erroneous jury instruction which was

reinforced by the prosecutor's comment, we are compelled to conclude that a sentencing error occurred under the rationale of *Hitchcock*. Therefore, the only remaining question is whether such error can be considered harmless. *Hitchcock; Delap v. Dugger,* 513 So.2d 659 (Fla. 1987).

The trial judge found the following aggravating circumstances:

> (b) Whether the defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> *Finding:*
>
> The defendant had been previously convicted of a felony involving the use of threat of violence to another.
>
> . . . .
>
> (d) Whether the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any burglary or rape.
>
> *Finding:*
>
> The stabbing which caused the death of LORINE DEMOSS HARMAN took place immediately after the vaginal penetration of her by the sex organ of STEPHEN TODD BOOKER. The other wounds took place while or immediately before and after completion of the crime of sexual battery. The capital murder also took place after Booker committed the felony of burglary of a dwelling as charged in Count III of the Indictment, and before he completed his flight from said crime.

(e) Whether the murder of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Finding:

The murder was not committed for the latter of these purposes, but, among other reasons, was committed for the purpose of avoiding or preventing a lawful arrest. [See aggravation paragraph below (h).] (Brackets in original).

(f) Whether the murder of which the defendant has been convicted was committed for pecuniary gain.

Finding:

There isn't evidence that the capital murder was committed for pecuniary gain though Booker did obtain personal property of his victim, and he thoroughly searched her apartment for whatever he wanted.

. . . .

(h) Whether the murder of which the defendant was convicted was especially heinous, atrocious or cruel.

Finding:

LORINE DEMOSS HARMAN was 94 years of age at the time of her death. She was active, alert, spry, enjoyed playing bridge on a regular basis with her friends, participated in church and other wholesome activities, preferred to take care of

> herself in her own apartment, to come and go in her pursuit of happiness and looked forward, as most others do, to the enjoyment of life.
>
> Booker did not know Mrs. Harman. When she returned from visiting with friends, the defendant severely beat, wounded, raped and finally killed her, but his aggressive, antisocial hatred had not yet been satiated, hence, she was stabbed in the throat before death and after suffering the horrible indignities inflicted upon a lady who had not previously confronted such a gross animal-like fiend.
>
> It is manifest from her picture in death that she suffered greatly in body and mind, knowing that her.death was near and by reason of degrading inhuman cruelty.
>
> There were seven stab wounds in her chest with one knife left embedded to its handle. There were no fewer than two stabs in her throat with a butcher knife left sticking through that part of her anatomy. There were other wounds and contusions with internal bleeding consistent with the outrageous beating of a 90-pound female by a strong overpowering male[.] Beyond gainsay, this cold, calculated capital murder was especially heinous, atrocious and cruel.

Booker, 397 So.2d at 916-17.

All of the mitigating evidence was directed toward Booker's mental and emotional stability. A detective testified that following his arrest Booker acted in a bizarre manner by chanting and referring to himself as "Aniel" and then made the statement that "Steve had done it." Booker presented a psychiatrist who said that he had reviewed

records of Booker's prior hospitalizations for mental problems which stated that he had been diagnosed as paranoid schizophrenic and as having organic brain syndrome secondary to drug use. Even though this psychiatrist had examined Booker twice, he was unable to conclude whether or not he was insane. The state's psychiatrist who had examined Booker on three occasions testified that he was legally sane and that he did not have organic brain syndrome. Both psychiatrists indicated that Booker's reference to himself as "Aniel" was likely the self-serving product of his own control. Booker himself took the stand and stated that he did not remember the acts which were alleged that he had committed, though he acknowledged that-when he got up that morning he felt like he may have wanted to kill someone. At the conclusion of his testimony and against the advice of his attorney, he made the following statement:

> THE DEFENDANT, MR. BOOKER: You people in the jury box have convicted me of first degree murder, sexual battery, and burglary. And you are going in the room and deliberate over what punishment should be given for a crime of this nature. A defendant found guilty of such a crime should receive the death penalty. That's it.

In the sentencing order, the judge found no mitigating circumstances. The judge rejected the "Aniel" syndrome as irrelevant and most likely self-serving and concluded that Booker "was the manipulative master of his acts at the time of the crimes."

In essence, Booker's position is that even though the evidence concerning his mental and emotional condition did not rise to the level of statutory mitigating circumstances, with the proper instructions the jury would have found it sufficient to recommend against death, and the judge would have accepted the jury's recommendation. We cannot agree.

Given the facts relevant to this sentencing, it would be unreasonable to conclude that even though the jurors did not find the mitigating evidence strong enough to offset the aggravating circumstances and thereby recommend life imprisonment, they would have done so had they realized that the same evidence could be considered as nonstatutory as well as statutory mitigation. We are convinced beyond a reasonable doubt that even with the proper jury instruction and without the prosecutor's compounding comment, the jury would not have made a recommendation for life imprisonment. There was simply no nonstatutory mitigating evidence sufficient to offset the aggravating circumstances upon which the jury could have reasonably predicated such a recommendation. We are also convinced beyond a reasonable doubt that the judge would have sentenced Booker to death regardless of the jury's recommendation and that an override would have been consistent with the rationale of *Tedder v. State,* 322 So.2d 908 (Fla. 1975). Accordingly, we deny the petition for writ of habeas corpus.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW and GRIMES, JJ., Concur
KOGAN, J., Dissenting with an opinion, in which BARKETT, J., Concurs

KOGAN, J., Dissenting.

In this case, as in *Demps v. Dugger,* 514 So. 2d 1092 (Fla. 1987), and *Delap v. Dugger,* 513 So. 2d 659 (Fla. 1987), I cannot say beyond a reasonable doubt that the sentencing error was harmless. The majority, in presuming that a jury recommendation of life would be properly overridden, places itself in the position of the trial judge and jury without having the benefit of anything more than the cold, impersonal record.

Again, as in *Demps,* there is no doubt that error occurred at the sentencing hearing in the instructions and argument to the jury. Yet the majority concludes that any error was harmless beyond a reasonable doubt.

In this case there is evidence of insanity or at least mental instability upon which the jury could reasonably have recommended life. Such a recommendation would, under *Tedder v. State,* 322 So. 2d 908 (Fla. 1975), be entitled to great weight. For these reasons, as well as for those reasons expressed in my dissenting opinion in Demps, I must again dissent. The danger in placing this Court in the position of jury and sentencer is self evident. Harmless error analysis invites that danger, particularly in a case such as this where there is significant nonstatutory mitigating evidence which could conceivably change the jury recommendation. Therefore, I cannot say beyond a reasonable doubt that the error which occurred in the sentencing phase was harmless. I would vacate the sentence of death and remand the case for a new sentencing proceeding in accordance with *Hitchcock v. Dugger,* 107 S.Ct. 1821 (1987), and *Lockett v. Ohio,* 438 U.S. 586 (1978).

BARKETT, J., Concurs

Stephen Todd BOOKER, *Petitioner,*

v.

Louie L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida, *Respondent.*

No. 82-5468

United States Court of Appeals, Eleventh Circuit.

April 25, 1983.

Rehearing and Rehearing En Banc Denied June 6, 1983

Petitioner appealed from an order of the United States District Court for the Northern District of Florida, Lynn C. Higby, J., which denied his petition for habeas corpus relief. The Court of Appeals, Fay, Circuit Judge, held that: (1) where state court did not make explicit whether it was considering federal constitutional provision or its state constitutional counterpart, and cited cases construing both, federal habeas court would view the state court as having treated the issue as to whether petitioner's privilege against self-incrimination was violated by prosecutor's use of information derived from a psychiatric examination as arising under both federal and state law for *Sykes* purposes, and (2) in murder trial, prosecutor's use of information derived from a psychiatric examination of petitioner for purposes of impeaching his testimony during penalty phase did not violate his constitutional right against self-incrimination.

Affirmed.

Stephen Bernstein, Gainesville, Fla., for petitioner.

Raymond Marky, Larry Kaden, Asst. Attys. Gen., Tallahassee, Fla., for respondent.

Appeal from the United States District Court for the Northern District of Florida.

Before FAY and VANCE, Circuit Judges, and ALLGOOD*, District Judge.

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

FAY, Circuit Judge:

Stephen Todd Booker appeals the district court's denial of his petition for habeas corpus challenging his sentence of death imposed pursuant to Florida Statute Section 921.141 (1977). On appeal, Booker advances four contentions: 1) the prosecutor's use of information derived from a psychiatric examination in cross examination of Booker during the penalty phase violated his fifth amendment rights; 2) the prosecutor's introduction of evidence concerning Booker's prior acts of violence permitted the jury to consider a non-statutory aggravating circumstance; 3) the state trial court improperly limited the jury's consideration of nonstatutory mitigating factors; and 4) the Florida Supreme Court's solicitation of ex parte psychological material concerning Booker was unconstitutional. After a careful consideration of Booker's claims on appeal, we affirm the denial of the petition for habeas corpus.

I. FACTUAL BACKGROUND

Booker was convicted on June 19, 1978 in the state court of first degree murder, sexual battery and burglary based upon evidence which showed that Booker entered the Gainesville, Florida apartment of Lorine DeMoss Harman, a ninety-four year old woman, raped Harman and stabbed her repeatedly in the chest and neck causing her death.

Booker was connected to the crime by body hair samples, fingerprints, and testimony concerning the print pattern of his shoes. Further, Booker "confessed" to a Gainesville police detective. This "confession" occurred while Booker was describing himself in the third person as Steve and calling himself "Aniel," which he spelled out for the detective and described as a demon.[1] While Booker was "Aniel," the detective asked him if "Stephen had done it," and Booker replied, "He did it, God damn it, he did it." There is no contention that the confession was involuntary and in fact, its substance was adduced during cross examination of the detective by Booker's attorney.

After Booker was duly indicted by the grand jury and a public defender appointed to represent him, defense counsel filed a motion for mental examination and notice of defense of insanity. (State Record at 4). A county judge granted the motion, committing Booker to an intake facility of the Department of Health and Rehabilitative Services to determine whether he was competent to participate in his own defense and appointing Jose Lineas, M.D. and George Barnard, M.D. to examine Booker as to his sanity or insanity at the time of the offense. (State Record at 9). Thereafter, both the state and defendant filed separate motions to appoint an additional psychiatrist to examine Booker on the grounds that the previously appointed doctors were unable to reach a conclusion regarding Booker's sanity at the time of the offense. (State Record at 32, 36). The state court appointed Dr. Frank Carrera to examine Booker. (State Record at 45). Dr. Carrera testified during the defendant's case and Dr. Barnard testified during the state's rebuttal case.

The case was submitted to the jury after three days of trial proceedings. The jury deliberated for slightly in excess of three hours and returned verdicts of guilty on all three counts. The next day, the advisory sentencing proceedings

occurred.[2] The only evidence introduced by the state at this time was a document relating to Booker's prior conviction for robbery. The only evidence[3] introduced by the defense was the testimony of Booker. Booker also made a statement prior to counsel's arguments on sentencing.[4] After hearing counsel's arguments and receiving the trial judge's instructions, a majority[5] of the jurors recommended the death sentence.

In October 1978, the trial judge had before him a presentence investigation report, the psychological report of Dr. Elizabeth MacMahon, certain medical records, a letter from Booker and the sentencing memoranda of counsel, as well as the recommendation of the jury and the oral arguments of counsel. The trial judge considered the statutory aggravating and possible mitigating factors and sentenced Booker to death for the murder of Lorine DeMoss Harman,[6] entering his written order in accordance with Fla.Stat. Section 921.141(3) (1977). (State Record at 142). *See also, Booker v. State,* 397 So.2d 910, 915-918 (Fla.1981).

Booker appealed to the Florida Supreme Court which affirmed the conviction and sentence. *Booker v. State,* 397 So.2d 910 (Fla.), *cert. denied,* 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). Booker also joined 122 other death row inmates in petitioning the Florida Supreme Court for extraordinary relief based on that court's possible consideration of extra-record psychological material in affirming the sentences. The Florida Supreme Court denied relief, *Brown v. Wainwright,* 392 So.2d 1327 (Fla. 1981), and the United States Supreme Court denied certiorari, *Brown v. Wainwright,* 454 So.2d 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

On March 22, 1982, the Governor of Florida signed a death warrant authorizing Booker's execution by electrocution on April 21. On April 13, Booker filed a petition for writ of

habeas corpus in the district court for the Northern District of Florida, alleging various grounds for relief and including a prayer for stay of execution. The district court denied the stay orally on April 15 and by a summary order on April 19. (Record at 260). The district court filed its order denying petition for writ of habeas corpus on April 20. (Record at 261). Booker filed a notice of appeal and an application for certificate of probable cause and to proceed on appeal in forma pauperis (Record at 270-71). The district court issued a certificate of probable cause and a certificate to permit appeal in forma pauperis (Record at 260), as well as an order denying Booker's application for certificate of probable cause and to proceed on appeal in forma pauperis (Record at 273). In any event, appeal was taken to the Eleventh Circuit, which issued an order granting stay. *Booker v. Wainwright,* 675 F.2d 1150 (11th Cir.1982).[7] We now consider the merits of Booker's claims on appeal.

II. USE IN CROSS EXAMINATION OF PSYCHIATRIC EXAM INFORMATION

A. The Procedural Bar

On this appeal, Booker claims that his privilege against self incrimination was violated when the prosecutor utilized information during cross examination of Booker's penalty phase testimony which was derived from a psychiatric examination. Booker contends that since the constitutional protections mandated by *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), were not afforded Booker, his death sentence must be vacated.

The state, however, argues that we are barred from considering the merits of Booker's *Estelle v. Smith* claim in a habeas proceeding pursuant to 28 U.S.C. Section 2254 by the doctrine of *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In *Sykes,* the United States Supreme Court held that a habeas corpus petitioner must

show "cause and prejudice" in order to advance in federal court those claims barred from consideration in the state courts by a valid procedural rule. The United States Supreme Court recently reaffirmed the Sykes doctrine in *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), recognizing that the costs of the federal writ of habeas corpus "are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts." 456 U.S. at 128, 102 S.Ct. at 1572.

The state argues that Booker's counsel did not adequately object at trial. During oral argument on this appeal, Booker's counsel, who has represented Booker throughout the state and federal proceedings, argued that the objection at trial was sufficient. Both parties also devoted considerable attention in their respective briefs to the "cause and prejudice" exception to *Sykes.*

One rationale for the *Sykes* doctrine is the integrity of the state court trial. "The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Sykes,* 433 U.S. at 90, 97 S.Ct. at 2508. However, equally important underpinnings of the *Sykes* doctrine are consideration of comity and federalism. As recently stated in *Isaac,* without *Sykes'* requirement that defense counsel present constitutional claims during trial, the state appellate courts would not have a "chance to mend their own fences and avoid federal intrusion." *Isaac,* 456 U.S. at 129, 102 S.Ct. at 1572.

Considerations of comity and federalism have resulted in the development of a well settled exception to the procedural default rule of *Sykes:* where a state appellate court does not rely on a procedural default, but reaches the merits of the

federal law claim, the *Sykes* bar is inapplicable. As explained by the United States Supreme Court, when the state courts do not indicate that a "federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State be entertaining the claim." *County Court of Ulster County v. Allen,* 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979). The former Fifth Circuit recognized this exception and applied it in numerous cases.[8] *See e.g., Sassoon v. Stynchombe,* 654 F.2d 371, 374 (5th Cir.1981); *Moran v. Estelle,* 607 F.2d 1140, 1142 (5th Cir.1979); *Cannon v. State of Alabama,* 558 F.2d 1211, 1216, n. 12 (5th Cir.1977), *cert. denied,* 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978).

The state contends that Booker did not adequately object at trial or present his federal constitutional claim on appeal to the Florida Supreme Court. The state further contends that no exception is applicable because "it is clear from the Florida Supreme Court's opinion that this issue was treated as a question of state evidentiary law rather than a federal constitutional question." (Brief of Appellee at 20, n. 3). We do not agree.

The Florida Supreme Court described Booker's position on appeal thusly:

> The defendant contends that during the sentencing proceedings the court committed error in permitting the prosecutor to ask questions based on information gathered from court ordered psychiatric reports. The defendant argues that this violated his right against self-incrimination.

397 So.2d at 913. The Florida Supreme Court also noted that:

> The defendant recognizes that a court ordered psychiatric examination generally is not considered violative of defendant's right to freedom from

> compelled self-incrimination[9] and that psychiatrists may render opinions concerning sanity based on factual statements made by the defendant.

Id. In both the above references to the right against self incrimination, the right is referred to generally, without denominating whether it is specifically the right embodied in the Fifth Amendment to the United States Constitution or Florida Constitution, Article 1, Section 9. Booker's Initial Brief to the Florida Supreme Court mentions both sources *initially* and then refers to the right generally. In deciding the dispositive issue, the Florida Supreme Court concluded:

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. *Harrison v. United States,* 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

397 So.2d at 914. By relying on *Harrison,* which did not concern Florida's privilege against self-incrimination,[10] the Florida Supreme Court was apparently considering both the state and federal constitutional privileges against self-incrimination. We therefore conclude that where a state court does not make explicit whether it is considering the federal constitutional provision or its state constitutional counterpart, and cites cases construing both, we will view the state court as having treated the issue as arising under both federal and state law for *Sykes* purposes. To hold otherwise would be to sanction an imprecision in jurisprudence intol-

erable in the realm of constitutional issues and to foreclose federal habeas review of federal claims because the language used by the state courts was vague.

Having decided that we are not barred by the procedural default doctrine of *Sykes,* we proceed to consider Booker's claim concerning the use of the psychiatric exam on the merits.

B. The Substantive Claim

Booker asserts that under *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), his constitutional privilege against self-incrimination was violated by the prosecutor's use of information allegedly gained from a psychiatric examination of Booker. In *Smith,* the United States Supreme Court held that

> when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to [the doctor] were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the state did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them.

Id. at 469, 101 S.Ct. at 1876. There is no contention that Booker was given *Miranda* or other suitable warnings before making statements to the psychiatrists who examined him.

Neither Booker's mere submission to a psychiatric or psychological examination, nor the fact that the defense may have requested an examination forecloses his claim under *Smith. Battie v. Estelle,* 655 F.2d 692, 702 (5th Cir.1981). In *Battie,* however, the former Fifth Circuit distinguished a situation where the government used the

results of a court-appointed psychiatric examination only after the defense had introduced psychiatric testimony in order to raise a mental defect defense, citing, *United States v. Cohen,* 530 F.2d 43 (5th Cir.), *cert. denied,* 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976).[11] *Battie* approved *Cohen's* holding that "the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's fifth amendment privilege in the same manner as would the defendant's election to testify at trial." *Battie,* 655 F.2d at 702.

In Booker's case, the issue of insanity was raised as a defense and a psychiatrist testified on behalf of the defendant. Thus, under *Battie,* there was a waiver of defendant's fifth amendment privilege as to psychiatric testimony. However, the jury had already rejected Booker's defense of insanity by finding him guilty on all three counts of the indictment and the use of the psychiatric testimony occurring during the subsequent penalty phase of the trial. We need not decide whether such a waiver under *Battie* during trial survives in the separate penalty proceeding in a capital case, since there is another determinative factor in Booker's situation.

Booker took the stand to testify during the advisory sentencing proceedings of the state trial. In answer to his attorney's specific inquiry as to whether he had a recollection of the day of the crime, Booker said he did not remember. Booker also testified that he had been in various hospitals, including Camp Codie Medical Center on Okinawa and Walter Reed Medical Center in Washington, D.C. while he was in the armed services. The following colloquy then occurred between Booker and his attorney:

Q: Have you had any difficulties during this time you were hospitalized from the time you were 13 until now with periods of time which you can't remember?

A: Yes, sir. Three of these occasions of hospitalization, that was the reason for being in the hospital.

Q: That you couldn't remember what had happened to you?

A: Yes, sir.

(State Transcript at 838). On cross examination, the prosecutor questioned Booker about his military service:

Q: Do [sic] you have problems with acts of violence while you were in the service?

A: Yes, I did.

Q: Other than these for fighting, have you ever attempted to kill people?

Q: While you were in Okinawa in the houses?

A: Could be.

Q: Do you know what I am talking about, Mr. Booker?

A: Yes.

Q: I'm talking about houses of prostitution. Did you ever try to kill anybody over there?

A: Not necessarily. I used to-we used to rob cat houses.

Q: What weapons did you use to hit people with?

A: Claw hammer.

Q: How many people do you think you hit with the claw hammer?

A: I can't recollect.

Q: More than five?

A: I would say about five.

Q: More than ten?

A: No.

(State Transcript at 841-42). Later, Booker's attorney objected to the prosecutor's questions relating to the day of the crime. The trial court overruled the objection on the grounds that the question of lapse of memory on the day of the incident was opened by the defendant on direct. The cross examination continued:

Q: Mr. Booker, my question to you was do you remember when you got up at 7:00 or 7:30 feeling that morning like you wanted to kill somebody?

A: Part of the way, yes.

Q: Did you know Mrs. Harman prior to this date?

A: No. I didn't.

Q: Had she ever done anything to you in her life to deny you anything or prevent you from anything?

A: No. In regards to me knowing her, I still don't know her. I have just been confronted with her in this courtroom in this charge.

Q: Did you attempt to kill anybody else that day; do you remember that?

A: Sure, I remember.

Q: Do you remember you did?

A: No. I didn't try to kill anybody that day.

Q: In the morning?

A: Right.

Q: You did not?

A: No. I didn't.

Q: Did you think about doing it?

A: Sometime I did, but I gave up the idea because it was crazy.

(State Transcript at 844-45).

Booker contends, and we assume without deciding, that the prosecutor obtained the information about the Okinawa houses of prostitution and Booker's state of mind upon waking on the day of the crime through information given to a psychiatrist[12] without the constitutional safeguards of *Estelle v. Smith.*[13] Yet, even assuming Booker's statements would not have been admissible in the state's case, there is no constitutional prohibition against using the information for impeachment purposes. *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).[14] In *Harris,* the United States Supreme Court reasoned:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [citations omitted]. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made

> by the accused to some third person, it could hardly be contended that the conflict could be laid before the jury by way of cross examination and impeachment.
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances.

401 U.S. at 225-6, 91 S.Ct. at 645-646. Since "the holding in *Smith* followed logically from the *Miranda* decision itself," *Battie* 655 F.2d at 699, it is likewise logical to conclude that the shield provided by *Smith* is also not susceptible to being perverted into a license to use perjury free from permissible impeachment.

While the prosecutor's questions concerning events on Okinawa may have been susceptible to an objection as being outside the scope of direct examination,[15] the cross examination questions do not rise to the level of a constitutional violation[16] and relief in a federal habeas action is therefore not warranted.

III. PRIOR ACTS OF VIOLENCE

Booker contends that the Okinawa activities elicited on cross examination of Booker during the advisory sentencing proceeding requires granting of the writ on another basis. In *Henry v. Wainwright,* 661 F.2d 56 (5th Cir.1981),[17] we held that it is constitutional error to allow a jury in a capital case to consider nonstatutory aggravating factors in deciding whether the death penalty should be imposed. Booker seeks to extend *Henry* to situations where the jury is properly instructed to consider only statutory aggravating factors but evidence of a nonstatutory aggravating factor has been presented to the jury.

To adopt Booker's theory would be to presume that the jury did not follow the court's instructions listing the aggravating circumstances and specifically limiting the jury's consideration to those circumstances. There is no hint in the record that the jury would have construed the Okinawa impeachment testimony as a nonstatutory aggravating factor. We decline to posit a per se rule to the effect that the introduction of any evidence that might possibly be interpreted as a nonstatutory aggravating circumstance renders the imposition of the death penalty unconstitutional notwithstanding specific instructions limiting the jury's consideration to the enumerated statutory aggravating factors.

IV. JURY INSTRUCTIONS ON NON-STATUTORY MITIGATING FACTORS

Booker argues that the trial court's instructions to the jury during the advisory sentencing proceedings improperly limited the jury's consideration of nonstatutory mitigating factors. The state argues that our consideration of this issue is barred by the procedural default doctrine of *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Booker concedes procedural default as to the jury instructions, but contends that he comes within the cause and prejudice exception to *Sykes.*

This issue is controlled by *Ford v. Strickland,* 696 F.2d 804 (11th Cir.1983) (en banc). In *Ford,* the trial judge similarly instructed the jury to consider *only* the enumerated aggravating factors and, omitting the "only," to consider the following mitigating factors. *Ford* also conceded procedural default in *Sykes.* In *Ford,* we stated:

> The *Sykes* issue becomes blurred in this case, however, because of two principles which mesh to deny Ford relief on this point. First, the Supreme Court has held that an erroneous jury instruction

> satisfies *Sykes'* prejudice prong only if actual, not possible, prejudice is shown so that there is '*actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.' *United States v. Frady,* 456 U.S. 152, 168, 102 S.Ct. 1584, 1595, 71 L.Ed.2d 816, 832 (1982).
>
> Second, in evaluating a trial court's instructions, we must determine the interpretation a reasonable juror might give the words of the instruction in question. *Sandstrom v. Montana,* 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). The entire charge must be examined as a whole to discern whether the issues and law presented to the jury were adequate. *Davis v. McAllister,* 631 F.2d 1256, 1260 (5th Cir.1980), *cert. denied,* 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981)
>
> The fundamental issue then is whether Ford has carried his burden in establishing that his jury perceived that in deciding whether to recommend life or death, it was denied the use of any nonstatutory mitigating factors.

696 F.2d at 812. As in *Ford,* we conclude that Booker has not carried his burden in establishing the jury perceived that in deciding to recommend life or death, it was denied the use of any nonstatutory mitigating factors. *Ford* set forth four reasons for this conclusion. Three of those reasons are applicable to Booker's case and bear repeating:

> *[F]irst,* the trial court read the statute as written, setting forth the entire list of statutory mitigating circumstances, which statute omits the word 'only.' The Supreme Court has recognized the Florida statute does not limit a jury's consideration of

mitigating circumstances to those listed in the statute. *Proffitt v. Florida,* 428 U.S. [242] at 250 n.8, 96 S.Ct. [2960] at 2965 n. 8 [49 L.Ed.2d 913].

Second, the instruction here was different from *Washington v. Watkins,* 655 F.2d 1346 (5th Cir.1981), *cert. denied,* 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982), where the state trial judge concluded the charge with these words:

> If you unanimously find from the testimony that *one or more of the preceding elements of mitigation* exist[s], then you must consider whether it outweighs the aggravating circumstances you previously found and you must return one of the following verdicts....

Id. at 1368 (emphasis added). Here the jury was not confined to two 'preceding elements of mitigation,' as in *Washington.*

Third, that petitioner was not limited in the introduction of evidence which might be considered mitigating and that the jury arguments encompassed all evidence introduced in the case explains counsel's perception that the jury was not denied the use of any evidence in weighing sentences. Thus had petitioner known of *Lockett [v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973], he would still have no reason to object because the jury was not in fact being limited to what it could consider.

Id. at 812-13. As in *Ford,* the rational conclusion is that the jury did not perceive a restriction on the consideration of any mitigating circumstances.

V. NONRECORD MATERIAL BEFORE THE FLORIDA SUPREME COURT

The final issue raised by Booker concerning the Florida Supreme Court's consideration of nonrecord material is also controlled by *Ford v. Strickland,* 696 F.2d 804 (11th Cir.1983) (en banc), where we stated:

> But even if members of the [Florida Supreme] court solicited the material with the thought it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it should not be so used, and the rejection of the notion that it affected the judgment of the reviewing judges of the court ends the matter when addressed at the constitutional level.

Id. at 811. We note only that Booker's attorney was furnished with the Florida Supreme Court's request of Booker's presentence investigation report, thus rendering this factual situation even weaker than *Ford.*

VI. CONCLUSION

Based on the foregoing, the district court's denial of the petition for writ of habeas corpus is AFFIRMED.

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1 The detective explained Booker during this time as follows:

> Prior to that time that he became Aniel he would chant. And the chanting would go on for perhaps ten seconds, 15 seconds, not long. It was during this time that the glassy eyes appeared. He had the glassy eye appearance. He would then settle, be serene, smile, and in my terminology clench his teeth. The grinding would stop, but his teeth would clench, and in that form he would begin to whisper things that I had to lean forward to hear.

> As my questioning related toward Aniel and who Aniel was, how he became acquainted with Aniel, and so on, as my questions grew more direct, he would burst into tears and cry. And he would laugh and wipe his tears from his eyes in a split second. He would then settle back in the chair, face me again, and be in a word, calm. He was rational in all aspects. Nothing was not understandable with the exception of the chant.

(Transcript of Trial Proceedings, Vol. IV, p. 627).

2 Pursuant to Fla.Stat. Section 921.141 (1977), the court was required, upon the defendant's conviction of a capital felony, to conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. After hearing all the evidence, the jury deliberates and renders an advisory sentence to the court of either death or life imprisonment.

3 The jury, however, is not restricted to evidence presented during the penalty phase in arriving at its advisory sentence and may consider evidence presented throughout the trial.

4 Booker, against the advice of his attorney, made the following statement to the jury:

> You people in the jury box have convicted me of first degree murder, sexual battery, and burglary. And you are going in the room and deliberate over what punishment should be given for a crime of this nature. A defendant found guilty of such a crime should receive the death penalty. That's it.

(Transcript of Trial Proceedings, Vol V., p. 850).

5 Unlike the verdict, the advisory sentence of the jury need not be unanimous. Fla.Stat. Section 921.141(3) (1977). The jury considering Booker's sentence voted nine to three to impose the death sentence. (Transcript of Trial Proceedings, Vol. V., p. 886).

6 The trial judge also sentenced Booker to a fifty-five year term for sexual battery and to a thirty year term for burglary, both sentences to run consecutively.

7 The Eleventh Circuit panel noted:

> In the limited time available to this court to examine the procedure, it is unclear whether or not the district judge granted or denied petitioner's application for certificate of probable cause to appeal, there being in the papers furnished to us what appears to be an order granting same and another order of denial, both dated April 19, 1982. Petitioner alleges that the certificate of probable cause was denied.

675 F.2d at 1151.

8 We are bound by the precedent of the former Fifth Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981).

9 This was the state of the law prior to *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

10 Harrison was convicted of murder in the District of Columbia and the Court was construing the Fifth Amendment to the United States Constitution.

11 Writing five years prior to *Estelle v. Smith*, the Fifth Circuit in *Cohen* stated

> [w]e have never reached the issue of whether a defendant's privilege against self-incrimination is violated per se by a court ordered psychiatric examination solely to determine the accused's mental condition at the time of the commission of the offense. Several other circuits have rejected this unconstitutionality-per-se argument on various grounds, while one has indicated approval of it. Relying on a balancing test, we choose to follow the former line of cases and permit compelled psychiatric examinations when a defendant has raised the insanity defense. [footnotes omitted].

530 F.2d at 47.

12 The Florida Supreme Court found that "the record does not conclusively show that the state attorney secured this information from the psychiatric reports." 397 So.2d at 914.

13 We have previously decided that *Smith* should be given retroactive effect. *Battie v. Estelle*, 655 F.2d at 699.

14 *See also, Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), (use of prearrest silence to impeach defendant does not violate privilege against self incrimination); *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980), (evidence suppressed as fruit of unlawful search and seizure may be used to impeach defendant's testimony given on cross examination).

15 The Florida Supreme Court, however, held that:

> The defendant opened up the question of what he remembered and whether he did or did not remember certain things. The trial court was correct in ruling that the state attorney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings.

397 So.2d at 914.

16 *Cf., Harris v. Spears,* 606 F.2d 639 (5th Cir. 1979), where we affirmed the granting of the writ of habeas corpus on the basis of the prosecutor's cross examination questions to defendant concerning statements attributed by implication to defendant's son. We stated "The constitutional error occurred, however, not when the questions were asked, but when the son was not called." *Id.* at 643. In *Harris,* the sixth amendment right to confrontation was determinative, a factor not applicable in *Booker,* since what is involved is Booker's statements.

17 This Unit B case decided November 12, 1981, is binding precedent for the Eleventh Circuit. *See, Stein v. Reynolds Securities, Inc.,* 667 F.2d 33 (11th Cir. 1982). *Henry* was vacated and remanded to the Eleventh Circuit by the United States Supreme Court, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326, for further consideration in light of *Engle v. Isaac.* On remand, we found that the issue was properly before us and adhered "to our earlier judgment that the state trial court committed constitutional error by allowing the non-statutory aggravating circumstances to be placed before and considered by the jury at Henry's sentencing hearing." *Henry v. Wainwright,* 686 F.2d 311, 315 (5th Cir.1982) (Unit B).

Stephen Todd BOOKER, Appellant,

v.

STATE of Florida, Appellee.

No. 55568.

Supreme Court of Florida

March 19, 1981.

Rehearing Denied June 2, 1981.

Defendant was convicted in the Circuit Court, Alachua County, John J. Crews, J., of murder in the first degree, sexual battery and burglary, and sentenced to death, and he appealed. The Supreme Court, Adkins, J., held that: (1) in sentencing procedure, trial court was correct in ruling that state attorney had right to inquire as to what defendant remembered; (2) photograph revealing knife protruding from victim's throat was admissible; (3) trial judge did not abuse his discretion in admitting card containing set of latent fingerprints lifted from closet door located inside bedroom of victim's apartment; (4) overwhelming circumstantial evidence demonstrated that defendant used force likely to cause serious bodily injury in commission of sexual battery; (5) State proved intent to commit a crime as required to support conviction of burglary with intent to commit larceny; (6) in sentencing proceeding, trial court did not take into account in "weighing process" any conceivable nonstatutory aggravating circumstances; (7) sentence of death was proper; (8) statute governing procedure when person is convicted of capital felony did not violate Constitution on ground that it attempted to govern practice and procedure; (9) death penalty statute was not too

narrowly defined in range of mitigating circumstances which sentencing authority could consider; and (10) death by electrocution is not cruel and unusual punishment.

Affirmed.

Stephen N. Bernstein, Asst. Public Defender, Gainesville, for appellant.

Jim Smith, Atty. Gen., and Charles A. Stampelos, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is an appeal from a judgment adjudicating defendant guilty of murder in the first degree and an order imposing a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. (1972).

Defendant was also adjudged guilty of sexual battery and burglary, receiving a sentence of fifty-five years for sexual battery and thirty-five years for burglary.

The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment. Fingerprints of the defendant were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.

Test results indicated that body hairs found on the clothing of the defendant at the time of his arrest were consistent with hairs taken from the body of the victim.

After being given the appropriate warnings, the defendant made a statement, speaking as an alternative personality named "Aniel." The "Aniel" character made a statement that "Steve had done it."

The indictment returned by the grand jury charged defendant with murder in the first degree, sexual battery, and burglary. A motion for mental examination and notice of defense of insanity were filed on behalf of the defendant and he was examined by three psychiatrists.

The defendant entered a plea of not guilty, but did not testify during the guilt phase of the trial. He was found guilty on all three counts of the indictment.

During the sentencing phase of the proceedings the defendant testified. At the conclusion of his testimony, and against the advice of his attorney, the defendant made a statement to the jury saying, "A defendant found guilty of such a crime should receive the death penalty." The jury recommended the death penalty and defendant was sentenced to death. This appeal resulted.

The defendant contends that during the sentencing proceedings the court committed error in permitting the prosecutor to ask questions based on information gathered from court ordered psychiatric reports. The defendant argues that this violated his right against self-incrimination. During the sentence hearing the defendant testified on direct examination that he had "no recollection" as to what happened on the day of the homicide. He stated that he had been hospitalized eight times in the past. During the times that he was hospitalized from the age of thirteen until now, the defendant said he could not remember the reasons for

being in the hospital. He testified that on three of the occasions his lack of memory was "the reason for being in the hospital." On cross-examination the defendant testified that he did not consider himself a violent person, but that he did have problems with acts of violence while in the service. He denied that he attempted to kill people, but admitted that while in Okinawa he robbed houses of prostitution and used a claw hammer with which to hit people. He admitted that he hit about five people. The prosecutor then asked defendant if he remembered "getting up feeling like he wanted to kill someone that day." His counsel objected at that point, contending that the prosecutor was seeking to elicit information contained in the reports of the psychiatrist and such information was privileged. The court ruled that the question went toward the defendant's lapse of memory on the day of the incident and was proper cross-examination. Finally, when asked if he thought about killing anyone that day, the defendant responded, "Sometime I did, but I gave up the idea because it was crazy."

The defendant recognizes that a court ordered psychiatric examination generally is not considered violative of defendant's right to freedom from compelled self-incrimination and that psychiatrists may render opinions concerning sanity based on factual statements made by the defendant. However, the defendant points out that direct testimony concerning the facts surrounding a crime is prohibited where ascertained from a compulsive mental examination. Defendant relies upon *Parkin v. State,* 238 So.2d 817 (Fla.1970), in which we held that the trial court should prohibit a psychiatrist from testifying directly as to the facts surrounding the crime, where such facts have been elicited from the defendant during the course of a compulsory mental examination. We said that the state, in its inquiry of a court appointed psychiatrist, should not go beyond eliciting

the opinion of the expert as to sanity or insanity and should not inquire as to information concerning the alleged offense provided by a defendant during his interview.

The defendant also cites *McMunn v. State,* 264 So.2d 868, 869, n.2 (Fla. 1st DCA 1972), where the court labeled as objectionable the question to the defendant, "[w]hether or not at that time and place you told Dr. Nelson the details of what happened that night including firing the shot?" The court also said that later impeachment testimony through the person of Dr. Nelson, the examining psychiatrist, was inadmissible. The defendant contends that the cross-examination of him by the prosecutor during the sentencing proceedings was based primarily upon information obtained from the report of the psychiatrist. This being privileged information, he argues that it was not subject to disclosure by cross-examination of defendant after he had taken the witness stand.

In *Parkin, supra,* we pointed out that if a defendant's counsel opens the inquiry to collateral issues, or admissions, or guilt, the state's redirect examination properly could inquire within the scope opened by the defense. The defendant took the stand during the sentence proceedings, and presented the issue of whether he could remember certain events. When the defendant chose to testify in his own behalf during the sentence proceedings, the issue of guilt had been decided adversely to him. A defendant who takes the stand as a witness in his own behalf occupies the same status as any other witness, and all the rules applicable to other witnesses are likewise applicable to him. *Hoskins v. State,* 70 Fla. 186, 69 So. 701 (1915); *Faulkner v. State,* 151 So.2d 17 (Fla. 2d DCA), *cert. denied,* 156 So.2d 389 (Fla. 1963). By taking the witness stand the defendant automatically subjected himself to cross-examination. *Kilgore v. State,* 271 So.2d 148 (Fla. 2d DCA 1972). A defendant who chooses to testify waives his privilege against compulsory

self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. *Harrison v. United States,* 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

During the cross-examination there was no reference made by the prosecutor to the psychiatrist or to the psychiatric reports. The defendant opened up the question of what he remembered and whether he did or did not remember certain things. The trial court was correct in ruling that the state attorney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings. Furthermore, the record does not conclusively show that the state attorney secured this information from the psychiatric reports.

During the course of the trial the state introduced into evidence two photographs of the victim as she was found at the scene of the crime. The defendant had no objection to the first photograph showing the position of the victim and the manner in which she was found. The second photograph was similar to the first but a cloth had been removed from the victim so as to reveal a knife protruding through the victim's throat. The defendant says that this photograph was so prejudicial as to render it inadmissible.

Photographs are admissible if they properly depict the factual conditions relating to the crime and if they are relevant in that they aid the court and jury in finding the truth. *Swan v. State,* 322 So.2d 485 (Fla.1975). The photograph was used in connection with testimony regarding the causes of death, *Henninger v. State,* 251 So.2d 862 (Fla.1971); the nature and extent of the "force and violence" used to perpetrate the crimes, *Alford v. State,* 307 So.2d 433 (Fla.1975), *cert. denied,* 428 U.S. 912, 96 S.Ct. 3227, 49

L.Ed.2d 1221 (1976); and the premeditated and coldblooded intent of the defendant, *Foster v. State,* 369 So.2d 928 (Fla.), *cert. denied,* 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979). The photograph was used for any or all of these three purposes, so making it relevant and admissible.

Investigator Terry lifted, among others, one particular set of latent fingerprints from a closet door located inside a bedroom of the victim's apartment. The latent fingerprints were placed on a card. The card was given by Terry to George Johnson, the latent examiner. Investigator Terry stated that the card was not in the same condition when it was introduced into evidence as when he lifted it. The fingerprint card was marked for identification. Investigator Terry did not make a similar comment regarding any other latent fingerprint card. George Johnson, the latent examiner, testified that he received the card from Investigator Terry; that he had the card in his custody until it was brought to court; and that it did not appear to be tampered with in any way. The trial judge enjoys wide discretion in areas concerning the admission of evidence. His ruling on the admissibility of evidence will not be disturbed unless an abuse of discretion is shown. *Rodriguez v. State,* 327 So.2d 903 (Fla. 3d DCA), *cert. denied,* 336 So.2d 1184 (Fla.1976); *Coppolino v. State,* 223 So.2d 68 (Fla. 2d DCA 1968), *appeal dismissed,* 234 So.2d 120 (Fla.1969), *cert. denied* 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970). The defendant has failed to show an abuse of discretion by the trial judge in admitting the card into evidence.

The defendant contends that a reasonable hypothesis of innocence exists on the question of whether or not actual physical force likely to cause bodily injury was used in the commission of the sexual battery. There was overwhelming circumstantial evidence demonstrating only one reasonable hypothesis; to wit: that defendant used force likely to cause serious bodily injury in the commission of the sexual battery.

See Hoy v. State, 353 So.2d 826 (Fla. 1977), *cert. denied,* 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978); *Jones v. State,* 332 So.2d 615 (Fla.1976); *Hallman v. State,* 305 So.2d 180 (Fla. 1974), *cert. denied,* 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

The defendant seeks a reversal of his conviction of burglary with intent to commit larceny because the state failed to prove an intent to commit a crime. It is true that a conviction of burglary requires proof of an intent to commit the crime that was alleged. *Rumph v. State,* 248 So.2d 526 (Fla. 1st DCA 1971). There was no showing that any property was taken from the victim's home. In fact, cash in the amount of $370.00 was found in the home by police officers who arrived at the scene.

"Burglary" means entering or remaining in a structure or conveyance with the intent to commit an offense therein. § 810.02, Fla.Stat. (1977). In a trial on the charge of burglary, proof of the entering of such structure at any time stealthily and without the consent of the owner is prima facie evidence of entering with intent to commit an offense. § 810.07, Fla.Stat. (1977). The evidence shows that bureau drawers, metal boxes, and jewelry boxes were rummaged. The apartment was ransacked. From this evidence the jury could infer that the defendant was in search of valuables and that his object was to steal them. *Walker v. State,* 44 Fla. 466, 32 So. 954 (1902). *See also Guerrero v. State,* 289 So.2d 396 (Fla.1974); *conformed to* 291 So.2d 103 (Fla. 3d DCA 1974). Intent, being a state of mind, must in most cases be inferred from the circumstances. *Edwards v. State,* 213 So.2d 274 (Fla. 3d DCA), *cert. denied,* 221 So.2d 746 (Fla.1968). The circumstances in the case *sub judice* are open to only one reasonable interpretation, *i.e.,* that the defendant entered the structure with intent to commit a larceny therein. The jury so concluded. The trial court did not instruct the jury on burglary with intent to commit

grand larceny, so the charge was limited to the crime of breaking and entering the structure with the intent to commit petit larceny. The conviction of burglary is affirmed.

In attacking the death sentence the defendant says that the trial court improperly considered the alleged previous acts of violence brought out by the cross-examination of the defendant, for they were unauthorized aggravating factors. The state replies that the trial court considered only statutory aggravating circumstances. The findings of the trial judge read as follows:

> MITIGATING CIRCUMSTANCES
>
> (a) Whether the defendant has no significant history of prior criminal activity.
>
> *Finding:*
>
> As a juvenile, Booker came to the attention of authorities for assaultive tendencies, truancy and theft. He was committed at least once to the Youth Center in New York and was given six months probation. He began using drugs of all kinds except "speed" when he was 13 years of age.
>
> The Defendant had one confirmed Army 15 involving violence to another.
>
> On November 12, 1974, the Defendant was sentenced in the Circuit Court, Collier County, Florida to five years in the state penal institutions for the offense of Robbery (strong arm)[.]
>
> (b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Finding:

Booker knew and was able to understand the nature, quality, and wrongfulness of his acts on November 9, 1977; was able to understand the charges against him; and was able to adequately cooperate with and assist his counsel in his defense at trial.

Booker has been an antisocial, hostile, somewhat paranoid individual who learned at an early age that "he could easily obtain what he wanted by illegal means and that he could control others through fear and manipulation."

There was argument of counsel, but no evidence whatever of extreme mental or emotional disturbance during the commission of the murder. [Refer to mitigation finding (e).] (brackets in original).

(c) Whether the victim, LORINE DEMOSS HARMON, was a participant in the defendant's conduct or consented to the act(s).[.]

Finding:

The victim did not at any time nor in any way consent to or participate in the conduct of defendant and his acts.

(d) Whether the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

Finding:

Booker was not an accomplice. No one else was involved, directly or indirectly. He was the aggressive perpetrator of the burglary of the dwelling, the sexual battery, and the murder.

(e) Whether the Defendant acted under extreme duress or under the substantial domination of another person.

Finding:

The Defendant did not act under the domination — not to mention — substantial domination of another person. The "Aniel syndrome" whereby Booker claimed that "Aniel" did it is and was irrelevant, most likely self-serving, and the evidence is bereft of any believable fact that the Defendant was being dominated by "Aniel" or anyone. To the contrary, he was the manipulative master of his acts at the time of the crimes.

Though the Defendant consumed intoxicants before the murder and may have experienced the "Aniel" phenomenon afterward, there isn't any evidence that he was under extreme duress at the time of the crimes.

(f) Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Finding:

At the time of the commission of the capital felony the Defendant's capacity to appreciate the criminality and to conform his conduct to requirements of law was not substantially impaired [Refer to mitigation finding (b).] (brackets in original).

"(g) The age of the Defendant at the time of the crime."

Finding:

Booker was in his majority at the age of twenty-four years at the time of the crime(s). Therefore, age had no particular significance and is not a mitigating circumstances.

AGGRAVATION

(a) Whether the defendant was under sentence of imprisonment when the defendant committed the murder of which the defendant has been convicted.

Finding:

Booker was not under sentence of imprisonment when he committed the murder for which he has been convicted.

(b) Whether the defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person.

Finding:

The defendant had been previously convicted of a felony involving the use of threat of violence to another.

(c) Whether, in committing the murder of which the defendant has been convicted, the defendant knowingly created a great risk of death to many persons.

Finding:

The Court does not consider the above provision in the Statute applicable to the defendant as an aggravating circumstance.

(d) Whether the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any burglary or rape.

Finding:

The stabbing which caused the death of LORINE DEMOSS HARMAN took place immediately after the vaginal penetration of her by the sex organ of STEPHEN TODD BOOKER. The other wounds took place while or immediately before and after completion of the crime of sexual battery. The capital murder also took place after Booker committed the felony of burglary of a dwelling as charged in Count III of the Indictment, and before he completed his flight from said crime.

(e) Whether the murder of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Finding:

The murder was not committed for the latter of these purposes, but, among other reasons, was committed for the purpose of avoiding or preventing a lawful arrest. [See aggravation paragraph below (h).] (Brackets in original).

(f) Whether the murder of which the defendant has been convicted was committed for pecuniary gain.

Finding:

There isn't evidence that the capital murder was committed for pecuniary gain though Booker did obtain personal property of his victim, and he thoroughly searched her apartment for whatever he wanted.

(g) Whether the murder of which the defendant has been convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

Finding:

Not applicable as an aggravating circumstance.

(h) Whether the murder of which the defendant was convicted was especially heinous, atrocious or cruel.

Finding:

LORINE DEMOSS HARMAN was 94 years of age at the time of her death. She was active, alert, spry, enjoyed playing bridge on a regular basis with her friends, participated in church and other wholesome activities, preferred to take care of herself in her own apartment, to come and go in her pursuit of happiness and looked forward, as most others do, to the enjoyment of life.

Booker did not know Mrs. Harman. When she returned from visiting with friends, the defendant severely beat, wounded, raped and finally killed her, but his aggressive, antisocial hatred had not yet been satiated, hence, she was stabbed in the throat before death and after suffering the

horrible indignities inflicted upon a lady who had not previously confronted such a gross animal-like fiend.

It is manifest from her picture in death that she suffered greatly in body and mind, knowing that her death was near and by reason of degrading inhuman cruelty.

There were seven stab wounds in her chest with one knife left embedded to its handle. There were no fewer than two stabs in her throat with a butcher knife left sticking through that part of her anatomy. There were other wounds and contusions with internal bleeding consistent with the outrageous beating of a 90-pound female by a strong overpowering male[.] Beyond gainsay, this cold, calculated capital murder was especially heinous, atrocious and cruel.

ACCORDINGLY, the Court further finds that there are insufficient mitigating circumstances to outweigh the aggravating circumstances which are sufficient to require the pronouncement of sentence hereinafter made.

The Court further finds that considering the facts and circumstances of this case a sentence less than that hereinafter pronounced would be insufficient, as Defendant himself stated.

There were no mitigating circumstances to be weighed against the aggravating circumstances. The defendant's reliance on *Elledge v. State,* 346 So.2d 998 (Fla.1977), is misplaced because the record reveals that the trial court did not take into account in the "weighing process" any conceivable non-statutory aggravating circumstances. The questions posed to the defendant during cross-examination were

used to negate a mitigating circumstance, *i.e.,* that defendant had a significant history of prior criminal activity. *See Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Knight v. State,* 338 So.2d 201 (Fla. 1976); *Meeks v. State,* 336 So.2d 1142 (Fla. 1976). When the defendant elects to testify during the sentencing proceedings, it is appropriate for the prosecutor to cross-examine him concerning previous criminal activity. Unless this mitigating factor is negated, there would be a presumption that defendant had not engaged in any previous criminal activity. It is apparent from an examination of the findings of the court that this evidence was not considered as an aggravating factor. The principles announced in *Elledge, supra,* and *Mikenas v. State,* 367 So.2d 606 (Fla.1978), are not applicable.

The jury recommended a sentence of death. The trial judge recited that he found no mitigating circumstances. The trial court found several aggravating circumstances, including the factor that the murder of which defendant was convicted was especially heinous, atrocious, and cruel. The sentence of death was proper.

Contrary to defendant's contention, we have held that section 921.141, Florida Statutes (1977), does not violate the requirements of article V, section 2(a), Florida Constitution, because it attempts to govern practice and procedure. *Dobbert v. State,* 375 So.2d 1069 (Fla.1979), *cert. denied,* 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980).

In light of *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 923 (1978), the defendant says that Florida's death penalty statute is too narrowly defined in the range of mitigating circumstances which the sentencing authority may consider. This argument was rejected by this Court in *Songer v. State,* 365 So.2d 696 (Fla.1978), *cert. denied,* 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Also, the directions given to the judge and the jury by the Florida

statute were sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). *See also State v. Dixon,* 283 So.2d 1 (Fla.1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974); *Spinkellink v. Wainwright,* 578 F.2d 582 (5th Cir. 1978), *cert. denied,* 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

Finally, we reject defendant's contention that death by electrocution is cruel and unusual punishment. *See Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947); *Spinkellink v. Wainwright, supra.*

The judgments and sentences of the lower court are affirmed.

It is so ordered.

SUNDBERG, C.J., and BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.